Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ERPENBECK COMMERCIAL ENTERPRISES, INC.,
Petitioner

v.

BOONE COUNTY FISCAL COURT,
BOONE COUNTY PLANNING COMMISSION,
Respondents

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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March 1995

96 pp

QUESTION PRESENTED

Does Agins[1] approve a zoning ordinance that conditions all development on an ad hoc, standardless review by the local politicians, or, on the contrary, does such an ordinance constitute an effective denial of all use of the land thereby violating the Lucas[2] Taking rule, and does such an ordinance constitute an arbitrary condition of development thereby violating the Dolan[3] Taking rule?

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[1] Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

[2] Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[3] Dolan v. City of Tigard, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

LIST OF PARTIES

Erpenbeck Commercial Enterprises, Inc. ("Erpenbeck") is the Petitioner.

Enterprise VI, a Kentucky General Partnership consisting of Albert J. Vesper III (also acting as Guardian of the Estate of Alicia Vesper), Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper, and Dennis J. Vesper ("Enterprise VI"), also a Petitioner below in a consolidated action, has elected to file a separate petition for writ as provided by Rule 12.2.

The Boone County Fiscal Court ("Fiscal Court") and the Boone County Planning and Zoning Commission ("Planning Commission") are the Respondents.

On the question presented, the aforementioned parties and the parties to the proceedings below are identical.

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Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The Order of the Supreme Court of Kentucky denying discretionary review (App., p.12) is unreported. The Orders of the Kentucky Court of Appeals denying petition for rehearing and affirming the judgment of the Boone Circuit Court (App., p.13) are unreported. The

Order of the Boone Circuit Court granting Defendants summary judgment (App., p.26) is unreported.

JURISDICTION

The Supreme Court of Kentucky entered its judgment on December 14, 1994 (App., p.12). This Petition has been filed within 90 days after the entry of said judgment. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

"No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws shall be liable to the party injured and in action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988 provides:

"In any action . . . to enforce . . . 42 U.S.C. §1983, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

In 1989, the seller, Enterprise VI, and the buyer, Erpenbeck, had a purchase contract subject to zoning approval of a second deal in which Erpenbeck was to sell a portion of the same land to Hyper Shoppes for a Biggs department store.

The Respondent County's amendment of the Comprehensive Plan in 1986 showed most of the Biggs portion of the property to be commercial, and, in conjunction with Plan amendments, the zoning was changed from I-1, an industrial zone, to C-2/PD, a

commercial zone with a "planned development overlay." The entire tract is 264 acres and is undeveloped. It adjoins the Greater Cincinnati and Northern Kentucky International Airport on one side and a four-lane state highway on the other. The non-commercial portion is all zoned industrial.

The C-2 zone without the PD is a traditional district which allows over 200 possible uses subject only to objective requirements, such as height limits in feet, setback limits in feet, parking spaces and the like which have readily understood effects. However, the PD subjects all 200 possible uses of the C-2 zone to, in the words of the state court majority, "an extra layer of regulatory review." The majority opinion quoted language of the ordinance referring to "imaginative designs" which "may" be allowed if found "compatible." Neither the County nor the majority opinion disputes the words of the dissent concerning the ordinance:

> ". . . the commercial two (C-2) planned development (PD) zone . . . contains no standards from which it can be ascertained whether or not a proposed development is entitled to approval or disapproval, and thus approval or disapproval of any proposed development is left entirely to the arbitrary discretion of the members of the fiscal court."

On submission for ministerial approval of the Biggs plan, which was in accord with all objective criteria of C-2, the Petitioners were advised that the standardless review applied to all 200 possible uses regardless of intensity. In an effort to mitigate their damages and exhaust

administrative remedies, they submitted to the standardless procedure. Following denial of the Biggs plan by the Planning Commission, Hyper Shoppes cancelled the deal and Erpenbeck failed to close, forfeiting its $150,000.00 deposit.

A few months later, the Biggs project was approved for land owned by one of the largest clients of the Planning Commission's Chairman even though the approval admittedly violated the Comprehensive Plan.

The record confirms that the trial court's opinion granting summary judgment to the Respondents was written by the Respondents' attorney with some modifications by the trial court. That opinion is rife with improper findings on disputed facts. However, the improper findings were cleaned up and not repeated by the Court of Appeals majority. Note, for example, that the Court of Appeals did not rely on the nine-acre overlap of employee parking into the I-1 industrial zone. Red herrings of that nature, written by the Respondents' attorney into the trial court opinion, will not cloud the clear constitutional issue.

The C-2/PD zone conditions all development on a standardless review. Petitioners contend that this fact equates the case with First English[4] and Lucas,[5] essentially depriving the Petitioners of all use. The majority of the Kentucky Court of Appeals approved application of the zone and denial of the Biggs project because a similar ordinance was referred to in Agins[6] and was not condemned in that opinion. However, the plaintiff in Agins made no attack on the ordinance for its standardless features and did not present a plan that conformed to the underlying zoning. In contrast with Agins, the Biggs department store was a permitted use in the straight C-2 zone, but was nevertheless denied by using the standardless procedure.

The majority also believed that Lucas stands for the proposition that, because the Petitioners' prior zoning was an industrial district which would not have allowed the Biggs project, the Petitioners could not prevail even if the C-2/PD is unconstitutional, despite the fact that the Comprehensive Plan now designates the property commercial. This interpretation is allegedly gleaned from Lucas' reference to prior uses allowed or prohibited by the common law.

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[4] First English Evangelical Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

[5] Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[6] Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

The federal questions involved herein were raised in the Amended Complaint filed in the trial court, and were ruled on by the trial court and the Court of Appeals. The Kentucky Court of Appeals is the highest state court available to the Petitioners because the Kentucky Supreme Court denied the Petitioners' Motion for Discretionary Review.

REASONS FOR REVIEW

1. Contrary to Kentucky, the State of Washington determined that a development condition that requires standardless review violates the U.S. Constitution as interpreted by the U.S. Supreme Court. Anderson v. City of Issaquah,[7] citing Connally v. General Const. Co.[8] See also, Grayned v. City of Rockford[9] and City of Buford v. Ward.[10] Washington is correct, Kentucky is wrong, and the supreme law of the land should apply uniformly in every state.

2. Standardless ad hoc review of land development that allows no use as a matter of right is the same as absolute control and constitutes a taking according to Lucas. It fails to advance a legitimate state interest, and

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[7] Anderson v. City of Issaquah, 70 Wash. App. 64, 851 P.2d 744, 751 (1993).

[8] Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322 (1926).

[9] Grayned v. City of Rockford, 408 U.S. 102, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

[10] City of Buford v. Ward, 212 Ga. App. 752, 443 S.E.2d 279 (1994).

constitutes a taking according to Nectow.[11] It violates procedural due process because the landowner has no advance notice of what is required, and it violates substantive due process because the result will necessarily be arbitrary, having no basis in prior written law. It violates the Equal Protection Clause, as shown by the subsequent approval for the Chairman's client, because treating everyone by the same standards is impossible when there are no standards. This condition of development is, therefore, arbitrary and unconstitutional, and such conditions are condemned by both the majority and the dissent in Dolan.[12]

3. The Kentucky majority's strained interpretations of Agins and Lucas are a blatant affront to this U.S. Supreme Court apparently motivated by a desire to protect Boone County from the naturally occurring liability resulting from the damage done by misuse of its standardless review.

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[11] Nectow v. City of Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928).

[12] Dolan v. City of Tigard, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

4. Standardless review procedures that are a pre-condition of any use constitute a dramatic leap from the traditional type of zoning facially approved by Euclid v. Ambler,[13] and yet such procedures are proliferating rapidly and are now viewed as a major problem nationwide. See the attached recent article called "Stop the Insanity," by Lane H. Kindig published by the American Planning Association in Land Use Law and Zoning Digest, January, 1995. App. p.73.

5. The essentially same issue of a required standardless review procedure was referred to in Pennell[14] and in Yee,[15] but it was not resolved because it was not clearly presented. In Pennell, there had been no application of the "hardship to a tenant" provision of the ordinance, and in Yee, the petitioners had failed to "run the gauntlet" of the procedure under attack. In this case, the issue is clearly presented.

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[13] Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[14] Pennell v. City of San Jose, 108 S.Ct. 849 (1988).

[15] Yee v. Escondido, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

6. Because the matter was decided on summary judgment, the facts are clear and uncomplicated as shown by the Court of Appeals majority and dissenting opinions. Improper factual findings written into the trial court's "Opinion" by the County's attorney were properly ignored by the Court of Appeals. These hackneyed canards will likely be repeated in response to this Petition, but they should be ignored as the Court of Appeals did. The U.S. Supreme Court will be able to limit its consideration to the facts and federal questions that were specifically dealt with and relied on by the Court of Appeals.

CONCLUSION

The Court should declare that enforcement of the ordinance was a violation of the Petitioners' constitutional rights to compensation, due process and equal protection. The matter should be returned to the state court system for a determination as to the amount of damages, if any, occasioned by the violation, and an award of attorney fees.

Respectfully submitted,

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Supreme Court of Kentucky
94-SC-769-D & 94-SC-778-D
(92-CA-3110-MR & 93-CA-262-MR)

ENTERPRISE VI, A KENTUCKY
GENERAL PARTNERSHIP, ET AL. MOVANTS

BOONE CIRCUIT COURT
V. 90-CI-174

BOONE COUNTY FISCAL COURT, ET AL. RESPONDENTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC. MOVANT

V. BOONE CIRCUIT COURT
90-CI-175

BOONE COUNTY FISCAL COURT, ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decisions of the Court of Appeals are denied.

ENTERED December 14, 1994.

Robert F. Stephens

Chief Justice

Commonwealth of Kentucky
Court of Appeals
NO. 92-CA-003110-MR

ENTERPRISES VI, A KENTUCKY
GENERAL PARTNERSHIP,
ALBERT J. VESPER, III,
RONALD J. VESPER,
PAUL J. VESPER,
STEPHEN J. VESPER,
DENNIS J. VESPER and
ALBERT J. VESPER, III
(GUARDIAN OF ALICIA VESPER ESTATE) APPELLEES

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

BOONE FISCAL COURT AND
BOONE COUNTY PLANNING
COMMISSION APPELLEES

AND: NO. 93-CA-000262-MR

ERPENBECK COMMERCIAL
ENTERPRISES, INC. APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

BOONE COUNTY PLANNING
COMMISSION and BOONE
COUNTY FISCAL COURT APPELLEES

ORDER DENYING PETITION FOR REHEARING

* * * * *

BEFORE: LESTER, CHIEF JUDGE; GARDNER, JUDGE and VANCE, SPECIAL JUDGE.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

Charles B. Lester

JUDGE, COURT OF APPEALS

ENTERED: AUG 26 1994

RENDERED: May 13, 1994; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals
NO. 92-CA-003110-MR

ENTERPRISES VI, A KENTUCKY GENERAL PARTNERSHIP, ALBERT J. VESPER, III, RONALD J. VESPER, PAUL J. VESPER, STEPHEN J. VESPER, DENNIS J. VESPER and ALBERT J. VESPER, III (GUARDIAN OF ALICIA VESPER ESTATE) — APPELLEES

APPEAL FROM BOONE CIRCUIT COURT
V. HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

BOONE FISCAL COURT and BOONE COUNTY PLANNING COMMISSION — APPELLEES

AND

NO. 93-CA-000262-MR

ERPENBECK COMMERCIAL ENTERPRISES, INC. — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
V. HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

BOONE COUNTY PLANNING COMMISSION and BOONE COUNTY FISCAL COURT — APPELLEES

OPINION
AFFIRMING
* * * * * * * *

BEFORE: LESTER, CHIEF JUDGE, GARDNER, JUDGE, and VANCE, SPECIAL JUDGE.

GARDNER, JUDGE: Appellants, Erpenbeck Commercial Enterprises, Inc. (Erpenbeck) and Enterprises VI and various members of the Vesper family (hereinafter collectively referred to as Enterprise) appeal separately from a summary judgment entered by the Boone Circuit Court in favor of the appellees, Boone County Planning Commission (Planning Commission) and Boone County Fiscal Court (Fiscal Court). After carefully reviewing the record, this Court must affirm.

Enterprise owned 263 acres of commercially and industrially zoned property located on Kentucky Highway 18 in Boone County, Kentucky. In 1986, this property had been rezoned from Industrial One (I-1) to Commercial Two (C-2), Planned Development (PD) zone. The C-2/PD allowed a baseline C2/commercial development subject to an extra layer of regulatory review pursuant to Article 15 of the zoning ordinance. Erpenbeck contracted to buy the 263-acre tract from Enterprise for approximately $27,000 per acre.[1] At the same time, Erpenbeck entered into a contract to sell 43 acres of this tract to Hyper Shoppes, Inc. (Hyper), and Hyper planned to construct a Biggs Department Store on the site. The alleged price was $120,000 per acre. The front 34.8 acres of this tract was zoned C-2/PD and the remaining nine acres were zoned I-1. The contract between Hyper and Erpenbeck allowed Hyper to pull out of the deal prior to February 28, 1990, or 30 days after the Fiscal Court approved the proper zoning, without suffering any penalty.

[1]Erpenbeck had also earlier paid $250,000 to Donald and Debra Streck. The Strecks and Erpenbeck had been negotiating with Hyper Shoppes, Inc. concerning a Biggs Store project. This payment made on June 19, 1989, was for acquiring all rights the Strecks might have. Erpenbeck later sought this amount as damages.

Erpenbeck filed an application with the Planning Commission on November 1, 1989, for zoning approval of the Biggs project under the C-2/PD zone.[2] A public hearing on the matter was held on December 6, 1989. The proposed plan showed the buildings in the C-2/PD zone and the parking lot/loading area extending into the I-1 zone. The Planning Commission after reviewing the Biggs plan, the Comprehensive Plan, and hearing all of the evidence, recommended rejection of the proposed Biggs project on January 3, 1990. The reasons for rejection included potential traffic problems and incompatibility with the 1986 Comprehensive Plan. On January 11, 1990, Hyper terminated its contract with Erpenbeck. Further, the record reflects that Erpenbeck's option to purchase Enterprise's property expired on February 1, 1990, without being exercised.[3] The Fiscal Court decided on February 6, 1990, to uphold the Planning Commission's decision and formally deny Erpenbeck's application for the Biggs project.

Appellants sought relief in Boone Circuit Court through a declaratory rights action under Chapter 418 of the Kentucky Revised Statutes (KRS). They sought monetary damages based upon violations of KRS 446.070, and KRS Chapter 100, and based upon their claim of an alleged regulatory taking of the property by the appellees. They also brought claims pursuant to 42 U.S.C. Sections 1983 and 1988. The circuit court in an opinion and order of November 20, 1992, granted the defendants' motion for summary judgment. The circuit court ruled that any appeal from the Fiscal Court's decision was moot because there could be no practical effect by reversing since the Biggs deal was no longer viable, and the property had been rezoned again. The court found no legal support for any of Erpenbeck's and Enterprise's claims. Erpenbeck and Enterprise both appealed to this Court.

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[2]Erpenbeck also sought to have the zoning line changed, but its proposal was rejected by the Board of Zoning Adjustment. Apparently, no appeal was taken.

[3]Erpenbeck lost $150,000 "good faith" money as a result of this termination and sought this amount as part of its damages.

One of the first considerations for this Court is the mootness issue. The circuit court found that a direct appeal from the Fiscal Court's decision regarding the Biggs proposal was a moot issue, because no practical effect could be gained by reversing the Fiscal Court's decision. There could be no practical effect, because Hyper had terminated the Erpenbeck agreement weeks prior to the Fiscal Court's decision, and Erpenbeck's contract with Enterprise had terminated on February 1, 1990. This Court agrees that the issue of any specific requested relief is moot, because there is no longer a viable

Biggs project for the property in question. This Court was presented with a substantially similar situation in Bourbon County Joint Planning Commission v. Simpson, Ky. App., 799 S.W.2d 42 (1990), and held that there could be no practical effect. Thus, we turn to the appellants' claims for damages.

Appellants maintain that the circuit court erred in failing to recognize the validity of their causes of action and in not setting the matter for trial on the question of damages and causation. They first attack the constitutionality of Article 15, the Planned Development Section, of the Boone County Zoning Laws.[4] They contend that the ordinance lacks any ascertainable standards for applicants and creates arbitrary power in local zoning officials in violation of Kentucky

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[4]The appellants did not provide a copy of Article 15 of the zoning ordinance with their briefs or provide a specific citation to the record so that this Court could locate it. Coincidentally and luckily, this Court found Article 15 when looking through exhibits provided with the record. This Court reiterates that it is not our job to search a record for testimony or items where no reference to the record is furnished. Younq v. Newsome, Ky., 462 S.W.2d 908, 910 (1971); Ventors v. Watts, Ky. App., 686 S.W.2d 833, 834-835 (1985). Further, CR 76.12(4)(c)(iv) provides that an appellant's brief shall contain an argument with ample supportive references to the record and citations of authority pertinent to each issue of law. Pierson v. Coffer, Ky. App., 706 S.W.2d 409, 413 (1985).

Constitution, Section 2. They also argue that the planned development provisions violate the limitations placed upon a county's zoning power by KRS, Chapter 100. The crux of their argument is that the C-2/PD ordinance provides a property owner with no uses for the property. This Court must disagree.

Article 15 defines and governs planned development in Boone County. It states, "Planned Development (PD) is a special overlay zoning district, which allows some variety among land uses and densities in return for imaginative designs." It also provides,

> Since Planned Development is an overlay zone, there is always an underlying zone which serves as a reference point to determine principally permitted accessory and conditional uses under the standard zoning classifications. However, if certain uses, which are not normally permitted in the underlying zone, are compatible, the Planned Development zone may be flexible to allow these uses. Also, the physical boundaries of the underlying zones within a Planned Development are intended to be flexible and not restrictive.

This Court finds that the circuit court correctly found that Article 15 is not violative of the Kentucky Constitutional provisions and KRS, Chapter 100. The circuit court correctly ruled that KRS, Chapter 100 provides for flexible planned development type regulations. As correctly stated by the circuit court, substantially similar zoning provisions were upheld in Bellemeade Co. v. Priddle, Ky., 503 S.W.2d 734 (1973). The Court in that case held that none of the statutes in KRS, Chapter 100 rendered planned neighborhood development zoning impermissible and also upheld the zoning against constitutional attack. The Court found that the zoning provisions were not void for lack of standards. In Danville-Boyle County Planning and Zoning Commission v. Prall, Ky., 840 S.W.2d 205 (1992), planned development statutes that were even more similar to those in the instant case were upheld by the Kentucky Supreme Court after being attacked on similar grounds. See also Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). There is a presumption favoring the validity of a zoning ordinance, and the burden is upon

those attacking it to prove that it is arbitrary. Clark v. City of Paducah, Ky., 439 S.W.2d 84, 86 (1969). If there is no more than a doubt about an ordinance's validity, it must stand as a valid exercise of the police power. Id.

Thus, this Court finds as a matter of law that the PD zoning provision in the instant case was not unconstitutional or in violation of KRS, Chapter 100. Article 15 expands already existing uses. Enterprise's property was originally zoned I-1, and by changing the zoning to C-2/PD, the appellees were expanding the potential uses of the property. Further, the record reflects that Erpenbeck received an adequate hearing on all facets of its plan for the Biggs store, and there is substantial evidence to support the Planning Commission's and the Fiscal Court's findings. See Danville-Boyle Counts Planning and Zoning Commission v. Prall, 840 S.W.2d at 108; American Beauty Homes Corp. v. Louisville and Jefferson Counts Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). The record reflects that a lot of careful thought and analysis went into the Planning Commission's recommendations about the Biggs proposal. Thus, the appellants' argument that the ordinance and its application in this case was arbitrary must fail. The statutes in Colyer v. City of Somerset, 306 Ky. 797, 208 S.W.2d 976 (1947); Board of Trustees of Town of Bloomfield v. Bayne, 206 Ky. 68, 266 S.W. 885 (1924), and other cases cited by appellants are fundamentally distinguishable.

Appellants also argue that as a matter of law, the enforcement of the PD zoning ordinance constitutes a taking of their property. They contend that the ordinance's application violates the Fifth Amendment to the United States Constitution and Section 242 of Kentucky's Constitution, because of the alleged taking without compensation. The circuit court's finding that a taking did not occur must be upheld.

Generally, a taking occurs when an owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good. Lucas v. South Carolina Coastal Council, _____ U.S. _____, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992). In deciding whether a taking has occurred, a court must consider the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Williamson Counts Regional Planning Commission v. Hamilton Bank

of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985). A land use regulation does not affect a taking if it substantially advances legitimate state interests. Id. A state or local government may in exercise of its police powers, incidentally restrict property rights of individuals for the common good without payment. Department for Natural Resources and Environmental Protection v. Stearns Coal and Lumber Co., Ky., 563 S.W.2d 471, 473 (1978). The action taken must bear a real and substantial relation to the public heath, safety, morality or general welfare. Id. The takings clause clearly does not require compensation when an owner is barred from putting land to use that is proscribed by existing rules; if the proposed uses are not part of the title to begin with, then there is no taking. Lucas v. South Carolina Coastal Council, 112 S.Ct. at 2901.

Almost invariably, some property owners suffer an actual or speculative financial loss as the result of zoning restrictions, but the mere fact that a forbidden use would be more profitable is not an unwarranted hardship which requires a finding of arbitrary action. Clark v. City of Paducah, 439 S.W.2d at 86. A diminution in property value alone does not constitute a taking; owners cannot show a taking simply by stating that they have been denied a property interest they heretofore had believed was available for development. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978). In Agins v. City of Tiburon, supra the Court upheld a planned development zoning scheme. The court ruled that no taking had occurred as the planned development advanced legitimate governmental goals and was part of the police power. Id., 100 S.Ct. at 2142. A court must consider the benefit to the public as a whole along with any diminution in market value the owner might suffer. Id.

As a matter of law, no taking occurred in the instant case. The Fiscal Court simply denied a single project to occur on the property owned by Enterprise.[5] There was no rezoning at question in this case; the property was zoned C-2/PD when Erpenbeck entered

[5]Erpenbeck never actually owned or had legal title to the property in question as it allowed the option to expire without purchasing the property. See Monticello Co. v. Commonwealth Natural Resources and Environmental Protection Cabinet, Ky. App., 864 S.W.2d 921 (1993).

into the agreement with Enterprise and when Erpenbeck entered into the agreement with Hyper. All parties knew the zoning status when they entered into the deal. There are over 200 possible uses allowed under the C-2 zone. In this case, the Planning Commission and Fiscal Court simply denied one project. The reports regarding the proposed project were very thorough. The Planning Commission was trying to advance substantial goals by avoiding excessive traffic and pedestrian congestion, damage to the natural corridor and growth that was not in keeping with the Comprehensive plan. The property had been previously all zoned I-1 and part of it remained zoned I-1 Such a project was clearly prohibited in I-1. Appellants have simply failed to show that a taking occurred in the instant case. This case is more akin to Agins v. City of Tiburon, supra, and is fundamentally distinguishable from cases cited by appellants.

Appellants also argue that because they were deprived of valuable property rights without substantive or procedural due process of law in violation of the Fourteenth Amendment to the United States Constitution, they are entitled to relief pursuant to 42 U.S.C. SS 1983 and 1988. This argument is totally without merit.

42 U.S.C. S 1983 provides,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A person seeking damages under 42 U.S.C. S 1983 must prove actual injury caused by a denial of his or her constitutional rights. Memphis Community School District v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986). There must be a sufficient property or liberty interest shown. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 2708-2709, 33 L.Ed.2d 548 (1972).

Appellants have made absolutely no showing that they are entitled to relief pursuant to 42 U.S.C. SS 1983 and 1988.[6] The cases cited by them are clearly not applicable to the case at bar. This Court has already found that the zoning ordinance in question was constitutional. As discussed earlier, the record shows that Erpenbeck received a fair hearing, and that there was substantial evidence to support the Planning Commission's and Fiscal Court's decision. There has been no showing of a violation of substantive or procedural due process. Appellants have also failed in proving there was a taking.

Erpenbeck also argues that as a matter of law, appellants have a valid cause of action pursuant to KRS 446.070 for enforcing an ordinance that violated KRS, Chapter 100, and for denying a permit in violation of KRS 522.030. This argument again totally lacks merit. We have ruled earlier in this opinion that Article 15 of the Boone County Zoning Ordinances did not violate Chapter 100 of the KRS. Further, there has been no showing of official misconduct as discussed in KRS 522.030.

Enterprise contends that there were factual issues regarding the appellants' claim of intentional interference with contractual relations. This argument is unfounded as there has been absolutely no showing that the elements of this tort as outlined in National Collegiate Athletic Ass'n., By and Through Bellarmine College v. Hornung, Ky., 754 S.W.2d 855 (1988), exist in the case at bar.

Enterprise lastly argues that the circuit court erred by failing to allow discovery of certain documents. Enterprise has presented no

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[6]There is also an issue as to whether an action pursuant to 42 U.S.C. S 1983 was even appropriate in this case, since appellants had not exhausted their state claims or remedies when they brought the action. It has been held that persons bringing 42 U.S.C. S 1983 claims must exhaust all state claims and show that state remedies are inadequate. Williamson Counts Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S.Ct. at 3121; Hammond v. Offutt, 866 F.2d 172 (6th Cir. 19B9); Presley v. Board of Education of Martin Counts, Xy. App., 859 S.W.2d 133-134 (1993). Appellants were still pursuing state avenues.

authorities to support its position, and has not specifically identified the documents in question. We have reviewed the record and can find no error on this ground.

Finally, the appellants argue that the circuit court erred by signing an opinion and order prepared by the appellees which granted summary judgment and dismissed all of the appellants' claims. They contend that there were factual issues remaining, and factual conclusions were misstated by the circuit court.

In Kentucky, a summary judgment should be entered if there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56.03. The record must be viewed in a light most favorable to the party opposing the motion, and all doubts are to be resolved in his or her favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). A trial court must only grant a motion for summary judgment if it appears that it would be impossible for the respondent to produce evidence warranting a favorable judgment against the movant. Id.; Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

In the instant case, there were no genuine issues of material fact. The issue regarding whether Hyper cancelled its contract as a result of the zoning process is immaterial since this Court has found that the zoning ordinance, procedures, and ultimate decision were valid, and since Hyper could pull out for any reason under the terms of the contract with Erpenbeck.

For the foregoing reasons, the judgment of the Boone Circuit

Court is affirmed.

LESTER, CHIEF JUDGE, CONCURS.

VANCE, SPECIAL JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

VANCE, SPECIAL JUDGE, DISSENTING. I respectfully dissent from the majority opinion which affirms the summary judgment entered by the trial court. I would hold that the commercial two (C-2) planned development (PD) zone violates the constitution of Kentucky, because it contains no standards from which it can be ascertained whether or not a proposed development is entitled to approval or disapproval, and thus approval or disapproval of any proposed development is left entirely to the arbitrary discretion of the members of the fiscal court.

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BOONE CIRCUIT COURT
CONSOLIDATED CIVIL ACTION NOS. 90-CI-174 AND 90-CI-175

ENTERPRISE VI, ET AL — APPELLANTS/ PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/ DEFENDANTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC., ET AL — APPELLANTS/ PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/ DEFENDANTS

OPINION AND ORDER
GRANTING DEFENDANTS SUMMARY JUDGMENT

****

Erpenbeck Commercial Enterprises, Inc. (Erpenbecks), Enterprise VI, and Albert J. Vesper, III (Vespers), appeal Boone Fiscal Court's decision of February 6, 1990. That decision denied Erpenbecks' application under Article 15 of Boone County's zoning regulations to approve a Biggs hypermarket retail center on 43.45 acres owned by Vespers. Their consolidated appeals are pursuant to K.R.S. 100.347. Vespers appeal under this statutory authority even though they were not applicants to Erpenbecks' submitted application.

Vespers and Erpenbecks also seek declaratory judgment relief and money damages from Boone Fiscal Court. They contend Article 15 is unauthorized as zoning regulations under Chapter 100 and that Fiscal Court's actions constitute a compensable taking. They assert inverse condemnation, tortious interference with contractual

relations, constitutional violations and violations of state and federal law to support the money damages claims.

The Boone County Planning Commission, organized under Chapter 100, recommended Erpenbeck's application be denied. Fiscal Court and Planning Commission members were sued individually but dismissed as defendants. All remaining parties have moved for summary judgment.

Fiscal Court and the Planning Commission argue that none of their actions caused damage or injury entitling plaintiffs to relief. From the undisputed material facts and applicable law, this Court agrees.

Facts

On July 21, 1989, Erpenbecks contracted to purchase Vespers' 264 acres located on the north side of Kentucky Highway 18, between Zig Zag Road and Old Limaburg Road. All 264 acres had to be purchased and full payment of the S7,250,000.00 price made no later than February 1, 1990. Vespers retained the 150,000.00 earnest money, Erpenbecks having failed to fulfill this contract.

Erpenbecks previously paid $250,000.00 to Donald and Debra Streck and Streck's corporation. Strecks and Erpenbecks had been negotiating with Vespers and Biggs parent company, Hyper Shoppes, Inc., to acquire the Vesper property and sell part of it to Biggs. This payment, made on June 19, 1989, acquired all rights Strecks might have, even though no contracts then existed with Vespers or Biggs.

Erpenbecks had no agreement with Biggs until August 17, 1989. Biggs reserved the right to terminate the agreement for any reason, in its sole discretion and judgment and could have done so prior to February 28, 1990, or 30 days after Fiscal Court approved Erpenbeck's proposal, whichever was later. On January 11, 1990, Biggs terminated the agreement with Erpenbecks, approximately 3 weeks before Fiscal Court acted. Further, since Erpenbecks failed to fulfill their contract with Vespers by purchasing all 264 acres no later than February 1, 1990, that contract became null and void by its own terms. When Fiscal Court acted on February 6, 1990, Erpenbecks no longer had a contractual interest in the property comprising their application.

Erpenbeck's application comprised 43.45 acres that was part of the Vesper property. Only 34.8 acres was zoned for commercial retail use and was subject to a planned development overlay classification under Article 15. The remaining approximate 9 acres was zoned industrial, not commercial retail, and was not subject to a planned development overlay review. None of the 43.45 acres has ever been zoned to allow as a matter of right the Biggs retail center.

Fiscal Court so zoned this 43.45 acres in 1986 as part of the county-wide zoning update. Prior to that time, all of the 264 acres was zoned industrial. The C-2/PD provided an opportunity that the Vesper property previously never had. It allowed commercial development, subject to the extra layer of regulatory review under Article 15. That review would allow commercial development compatible with the 1986 comprehensive plan. Erpenbecks knew the Vesper property's zoning classification in June, 1989. They acknowledged that classification in the contracts with Vesper and Biggs, providing that zoning approval required Fiscal Court approving Erpenbeck's application and concept development plan by enacting an ordinance.

Erpenbecks submitted their application for a Biggs hypermarket retail center on November 1, 1989. It sought approval for 417,600 square feet of regional retail space on the 34.8 acres commercially zoned. All the shipping and receiving area and some of the 2,113 parking spaces needed for this intense regional retail development extended into the industrial zone. These facilities were exclusively to serve the commercial development and were not accessory to any industrial use in the industrial zone. Plaintiffs argue that this approximate 9 acre overlap imposes no adverse land use impact since parking and shipping areas are allowed in the industrial zone to serve industrial users. The distinction, however, is that by allowing the commercial regional retail development to extend by this magnitude into the industrial zone, the massive commercial development in the C-2/PD zone becomes larger, generating higher volumes of regional retail traffic.

The 1986 Boone County Comprehensive Plan recommends that this segment of Kentucky 18 be commercially developed, but not for regionally oriented massive retail that generates high volumes of traffic. That type of regional retail development is identified as

being more appropriate and suitable for areas closer to the interstate highway system, such as Mall Road. For this reason, the Commission recommended and the Fiscal Court zoned the property with a planned development overlay. Without that regulatory review process it would not have been consistent with the comprehensive plan to zone the area commercial two. That zoning classification, without a planned development overlay, would have allowed massive regionally oriented retail development, contrary to the comprehensive plan.

For Erpenbecks, it was crucial that Biggs purchase the 43.45 acres. Without that purchase, Erpenbecks would not close with Vespers on the 264 acres. While Biggs purchase was crucial to Erpenbecks, Biggs at no time was obligated to perform under its agreement with Erpenbecks. When Biggs terminated, it was entitled to a complete refund of its earnest money, with accrued interest. At that time, Biggs did not know costs for the concept development plan had exceeded the only installment paid for those costs of $50,000.00. Only to compromise a dispute with Erpenbecks did Biggs pay more than that installment of $50,000.00 for development plan costs.

The facts further clearly show that even had the Erpenbeck application received Fiscal Court approval, it was not fully acceptable to Biggs for purchase purposes. Biggs wanted the retail center building located to the rear of the 43.45 acres, in the industrial zone. That placement would provide a larger parking field between the retail center and Kentucky 18 and was necessary to make the plan more acceptable to Biggs. Pierre A. Wevers, executive vice-president of Hyper Shoppes considered placing the Biggs retail center in the industrial zone part of the general process of the Erpenbeck plan getting zoning approval. Michael C. Phillips, then Director of Real Estate for Hyper Shoppes, oversaw this project for Biggs. Being unable to place the hypermarket building in the industrial zone meant, to him, that the site and Erpenbeck's plan was unacceptable and unusable for a Biggs. Even had Fiscal Court approved the Erpenbeck plan, there is no evidence Biggs would have purchased the 43.45 acres.

From the undisputed facts, the following dates are significant:

1. June 19, 1989 - Erpenbecks $250,000.00 payment to Strecks;

2. July 21, 1989 - Date of Vesper-Erpenbeck Contract;

3. August 17, 1989 - Date of Erpenbecks-Biggs (Hyper Shoppes) Contract;

4. November 1, 1989 - Erpenbeck application filed with Commission;

5. December 6, 1989 - Public Hearing date before Commission;

6. January 3, 1990 - Commission recommendation to Fiscal Court;

7. January 11, 1990 - Biggs terminates Erpenbeck Contract;

8. February 1, 1990 - Erpenbeck option to purchase Vesper property expires without being exercised; and

9. February 6, 1990 - Fiscal Court final action denies Erpenbeck application.

Applicable Law

Erpenbecks and Vespers allege, based on Fiscal Court's denial, Biggs cancelled the agreement with Erpenbeck and, in turn, Erpenbeck cancelled the agreement with Vespers. Clearly, Biggs terminated the Erpenbeck agreement weeks prior to the Fiscal Court action and Erpenbeck's contract with Vespers terminated by its own terms on February 1, 1990. There no longer was a viable application for a Biggs retail center and Erpenbeck had no contractual interest when Fiscal Court acted, and Vespers were not parties to that application. Therefore, Erpenbecks and Vespers are not aggrieved persons by the Fiscal Court's action as required by K.R.S. 100.347 and they are not entitled to relief under that statutory appeal. Further, the appeal presents a moot issue as there can be no practical effect by reversing Fiscal Court's decision. Another factor rendering the appeal moot is Fiscal Court rezoned the previous C-2/PD area to a commercial four zone as part of the county 1991-1992 comprehensive plan and zoning update. This new classification does not allow regional retail development at the intensity proposed for the Biggs retail center. See K.R.S. 100.347; Bourbon Co. Joint Planning v. Simpson, Ky.App., 799 S.W.2d 42 (1990); and Shelby Petroleum v. Croucher, Ky.App., 814 S.W.2d 930 (1991).

These same mootness considerations apply to plaintiff's request for declaratory judgment relief. However, even if not moot, Fiscal Court's decision adopting the Commission's recommendation and its findings are supported by the record. The supporting committee report dated January 3, 1990, comprises nine pages, listing numerous reasons to deny, based on land use impacts, the comprehensive plan, intensity of development, traffic generation, land use incompatibility, and the development extended into the industrial zone. Deference must be afforded governmental administrative regulatory decisions and upheld if substantial, reliable and probative evidence within the record as a whole supports the decision. American Beauty Homes Corp. v. Louisville, Ky., 379 S.W.2d 450 (1964), Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971), and Hocker v. Fisher, Ky.App., 590 S.W.2d 342 (1979).

Here, the record supports the Fiscal Court's decision and the Commission recommendation. To hold otherwise requires approval of a development that conflicts with the comprehensive plan and extends commercial development into an industrial zone. See Carlton v. Taylor, Ky.App., 569 S.W.2d 679 (1978).

Plaintiffs argue Fiscal Court's action constitutes a regulatory compensable taking, as applied or on its face, under federal and state law. They contend the planned development regulations do not advance a legitimate governmental interest, are not authorized under Kentucky law, and prohibit all beneficial or productive use. This Court finds no legal support for these arguments, based on these facts.

The planned development overlay had a C-2 underlying zone, recognizing numerous uses that Erpenbecks or Vespers could pursue. Those regulations did not prohibit or ban submittal of applications for any of these uses. Only the delay associated with the review process was caused by the planned development overlay. PD's process does not amount to a moratorium as plaintiffs urge. Instead, it imposes a regulatory review process based on the comprehensive plan to determine the compatibility, appropriateness and intensity for uses in the underlying zone. Rather than prohibiting all use, these regulations provided a review process under which any of numerous uses may have been approved and, therefore, do not represent a compensable taking. See First English v. Los Angeles Cty., 107 S.Ct. 2378 (1987); Pennell v. City of San Jose, 108 S.Ct. 849 (1988);

Keystone Bituminous Coal v. DeBenedictus, 107 S.Ct. 1232 (1987); and Com., Nat. Resources v. Starns Coal and Lumber, Ky., 678 S.W.2d 378 (1984).

Kentucky law provides broad authority for zoning regulations. K.R.S. 100.201 and .203 recognize as legitimate purposes for zoning those same reasons and land use impacts applied herein as part of the planned development review. These statutes authorize zoning under local governments' police powers to promote public health, safety and general welfare within the planning unit. Facilitating orderly and harmonious development, regulating intensity of land use, preventing overcrowding of land and congestion in the circulation of people are specifically recognized as legitimate governmental purposes for exercising zoning authority. Special zoning districts promoting proper development of planned business or commercial districts and regulating activities and structures on land at or near major thoroughfares, interchanges, transportation arteries, and other places having a special character are expressly authorized. This broad statutory authority has been recognized to include and encourage flexible planned development type regulations. See Tarlock, Kentucky Planning and Land Use Control Enabling Legislation, Etc., 56 Ky. L.J. 556 at 598 (1968).

In Bellemeade Co. v. Priddle, Ky., 503 S.W.2d 734 (1974) similar if not identical regulations were upheld under these statutes. Where regulations promoting these legitimate governmental purposes are consistent with the comprehensive plan, they are a valid exercise of Chapter 100 zoning authority. Moreover, the planned development review process did not apply in all zoning districts. Plaintiffs could have pursued a number of uses under the C-2/PD zone or sought a rezoning to another district without the planned development overlay.

Clearly Article 15 is consistent with and advances recognized legitimate governmental interests of regulating land use. Plaintiffs seek the equivalent of a judicially imposed zone change, without following Chapter 100. This, the Court cannot do. Sladon v. Shawk, Ky.App., 815 S.W.2d 404 (1991) and Louisville v. McDonald, supra. Even if the overlay regulations are invalidated, plaintiffs are not unilaterally entitled to a C-2 zone. Plaintiffs never sought a zone change and a C-2 zone allows development contrary to the comprehensive plan. The Court cannot assume such legislative power.

Instead, the prior industrial zoning would apply and Erpenbecks still would not have been entitled to approval. See Mann v. City of Ft. Thomas, Ky., 437 S.W.2d 209 (1969).

For the same reasons plaintiffs' facial taking argument must be rejected. To prevail, the mere enactment of the overlay regulations in 1986 must show on its face a prohibition of all productive use. Mere delay associated with a regulatory review process that allows some productive use is not a taking on its face. It must be applied to determine whether it will amount to a taking. Agins v. City of Tiburon, 100 S.Ct. 2138 (1980); Penn Central v. City of New York, 98 S.Ct. 2646 (1978); Lucas v. South Carolina Coastal Council, _____ S.Ct. _____ dec'd June 29, 1992; First English, supra; and Pennell, supra. Other property in the immediate vicinity zoned C-2/PD has approved commercial development at a lesser intensity.

Other states applying the Supreme Court's taking analysis reach the same result. Even wetland legislation does not affect a compensable taking where the owner may apply for uses that could be approved under a discretionary approval process. Where property is subject to such a process when the developer contracts to purchase, that developer has no protected investment backed interest or expectation that the approval will be granted. Gil v. Inland Wetlands and Watercourses, 593 A.2d 1368 (Conn. 1991); Namon v. DER, 558 So.2d 504 (Fla. 1990); and Carabell v. DNR, 478 N.W.2d 675 (Mich.App. 1991).

Denial of the most profitable or beneficial use of land is not a constitutional violation of just compensation or substantive due process. Andrus v. Allard, 100 S.Ct. 318 (1979) and Euclid v. Ambler Realty Co., 47 S.Ct. 114 (1926). Judge Bertelsman followed this same principle in a Kentucky case. See Stratford v. State-House, Inc., 542 F.Supp. 1008 (E.D. Ky. 1982).

Plaintiffs additionally cite K.R.S. 446.070 and 522.030 for statutory damages. There is no proof of statutory violations entitling plaintiffs to money damages. Plaintiffs also assert a tort claim for interference with contract relations. There is no proof to support allegations of improper interference by defendants. Further, defendants were engaged in regulatory functions of government of a quasi-judicial nature which does not constitute tortious conduct for which they can be liable in tort. See K.R.S. 65.2003; NCAA v. Hornung, Ky., 754 S.W.2d 8S5 (1988); and Bolden v. City of Covington, Ky., 803 S.W.2d 577 (1991).

Plaintiffs argue the zoning administrator approved the extension of commercial development into the industrial zone. They offer the administrator's October 5, 1989, letter as his ruling. This Court rejects this argument. K.R.S. 100.271 prohibits a zoning administrator from allowing uses that do not conform to the literal terms of the zoning regulations. Only the Fiscal Court can approve uses for areas subject to a PD overlay. The October 5th letter merely informs that the PD review may allow some minimal overlap. Erpenbeck's application was not filed until November and its overlap exceeded 10% mentioned in the informational letter. Cases cited by plaintiffs involve instances where the official had authority to make a decision. Here, the administrator had no authority to approve uses in areas zoned planned development. Another pending matter is Vesper's motion to compel production of documents. The parties have submitted memoranda and the Court has reviewed the documents in-camera. These documents clearly are communications within the attorney-client relationship on legal matters arising from that relationship. This Court has previously held the documents are not subject to inspection under the Open Records Act. Further, the documents are not relevant in themselves, nor calculated to lead to relevant facts. Plaintiff's motion to compel is overruled.

ORDER

Based upon these facts and authorities plaintiffs cannot prevail and Boone Fiscal Court and Boone County Planning Commission are entitled to judgment as a matter of law.

IT IS HEREBY ORDERED AND ADJUDGED that Boone Fiscal Court and Boone County Planning Commission are granted Summary Judgment, dismissing all claims and plaintiffs' appeals.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that plaintiffs motions for declaratory judgment and summary judgment are overruled and denied, with prejudice.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that this is a final and appealable judgment pursuant to Civil Rule 54.02 and there is no just reason for delay. The Clerk is directed to provide notice of entry of this Order pursuant to Rule 77.04.

J. F. Bamberger
JUDGE, BOONE CIRCUIT COURT

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BOONE CIRCUIT COURT
CASE NO. 90-CI-174
C/W CASE NO. 90-CI-175

ERPENBECK COMMERCIAL ENTERPRISES, INC.
APPELLANT-PLAINTIFF

v. NOTICE OF APPEAL FROM DECISION OF BOONE COUNTY FISCAL COURT AND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MONETARY DAMAGES

BOONE COUNTY FISCAL COURT, ET AL.
APPELLEE-DEFENDANTS

-and-

ENTERPRISE VI, ET AL. APPELLANT-PLAINTIFFS

v.

BOONE COUNTY FISCAL COURT, ET AL.
APPELLEE-DEFENDANTS

* * * * * * * * *

Comes the Appellant-Plaintiff, Erpenbeck Commercial Enterprises, Inc., by counsel, and for its Amended Complaint, states as follows:

1. Appellants, Dennis J. Vesper, managing partner, and Albert J. Vesper III, guardian for the estate of Alicia Vesper, d/b/a Enterprise VI, a Kentucky general partnership, and Erpenbeck Commercial Enterprises, Inc. were the owners of real estate located in Boone County, Kentucky, on Route 18, which is fully described in Exhibit "A" attached to the original action at the times relevant to this action.

2. Appellants hereby give Notice of Appeal to the Boone Circuit Court from the final decision of the Boone County Fiscal Court, rendered February 6, 1990, adopting the recommendation of

the Boone County Planning Commission denying the utilization of the underlying zone on the property of the Appellants.

3. The Appellants, and each of them, have been injured and aggrieved by the action of the Boone County Fiscal Court and bring this Appeal pursuant to Kentucky Revised Statutes Section 100.347 as interpreted and applied by the Boone County Fiscal Court through its "Zoning Regulations: Boone County, Kentucky" adopted December 1986 (herein "Zoning Order"), Section 230.

4. Appellants appeal the action of the Boone County Fiscal Court as contrary to law and fact in that:

A. The decision of the Boone County Fiscal Court is contrary to and arbitrary based on the evidence presented; or

B. The decision of the Boone County Fiscal Court was arbitrary in that it was not supported by substantial evidence; or

C. The action of the Boone County Fiscal Court denying Appellants' use of their property causes Appellants to be treated differently than other persons similarly situated and inconsistent with the mandates of KRS Section 100.203 requiring uniformity of regulations; or

D. The action of the Boone County Fiscal Court in denying Appellants the use of their property bears no reasonable relationship to the public health, safety, morals, or general welfare of Boone County; or

E. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is unreasonable, arbitrary, and confiscatory and is an absue of its discretion; or

F. The Boone County Fiscal Court's Zoning Order, Article 15, is contrary to, not authorized by and inconsistent with Chapter 100 of the Kentucky Revised Statute; or

G. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is inconsistent with the "Zoning Order" in that:

(i) The Fiscal Court has applied the Zoning Order, Article 15, regulations to Appellants' property although no Concept Development Plan has been proposed or adopted for the subject property by the Boone County Fiscal Court as required by Zoning Order, Section 1502; and/or

(ii) The Boone County Fiscal Court and the Boone County Planning Commission failed to follow the requirements of the Zoning Order, Section 1506, when it failed to make a finding that the proposed use of Appellants' property did not "deviate from standard district regulations"; and/or

(iii) The Boone County Fiscal Court failed to implement and enforce its Zoning Order when the proposed use of the Appellants' property was authorized under the Zoning Order, including Articles 9 and 10.

5. The action of the Boone County Fiscal Court and its Boone County Planning Commission in denying the use of the Appellants' property was a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States prohibition against depriving "any person of life, liberty or property without due process of law" and violative of sections 13 and 242 of the Constitution of the Commonwealth of Kentucky.

WHEREFORE, the Boone Circuit Court is asked to review the actions of the Boone County Fiscal Court and render appropriate orders.

COMPLAINT FOR DECLARATORY JUDGMENT
AND
MONETARY DAMAGES

6. The Plaintiffs incorporate and reallege Paragraphs 1 through 5 hereof and state in more detail as follows:

I. Introduction

7. This action is brought pursuant to Kentucky Revised Statute, Chapter 418, and the Rules of Civil Procedure and seeks a declaration of rights of the Plaintiffs under Kentucky Planning and Zoning Statutes, Kentucky Revised Statute 100.111 et seq. and the "Zoning Order: Boone County, Kentucky," adopted December 1986. Additionally, Plaintiffs seek an award of damages from the Boone County Fiscal Court for inverse condemnation; tortious interference with contractual relations and vested property rights, violations of the United States Constitution, Constitution of Kentucky, federal and state law and in the alternative, against the other Defendants individually.

II. Parties

8. Enterprise VI is a Kentucky general partnership consisting of Albert J. Vesper III, Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper, and Dennis J. Vespers who serves as managing partner. Albert J. Vesper III is guardian for the estate of Alicia Vesper pursuant to an order of the Kenton District Court, Probate Division (herein individually and collectively referred to as "Vesper"). Vesper has been aggrieved and injured by the actions of the Boone County Fiscal Court and the Boone County Planning Commission.

9. Vesper is the owner of a 264 acre parcel of real estate located in Boone County, Kentucky, on Kentucky 18 at Limaburg, Kentucky. The subject of this litigation is a particular 43.45 acre site which is part of the larger tract and described in Exhibit A attached (herein "Zoned Parcel").

10. Erpenbeck Commercial Enterprises, Inc. is a Kentucky corporation engaged in the development of real property (herein "Erpenbeck").

11. The Boone County Fiscal Court (herein "Fiscal Court") is the chief body with legislative power in the county where the Zoned Parcel is located. It has the authority to regulate the zoning in unincorporated areas of Boone County pursuant to Chapter 100 of the Kentucky Revised Statutes (herein "Zoning Enabling Legislation").

12. The Fiscal Court acts through its county commissioners and the county zudge-executive. The Defendants, Bruce Ferguson, Don Davis, Shirley Meihaus, and Irene Patrick, are members of the Boone County Fiscal Court (herein "Fiscal Court Members").

13. The Boone County Planning Commission (herein "Commission") is the planning unit established by the Fiscal Court pursuant to the Zoning Enabling Legislation to perform planning operations for the Fiscal Court and operate as an administrative body of the Fiscal Court in performing those duties. Included within these duties are (i) the making of recommendations to the Fiscal Court under Article 3 of the Zoning Order and (ii) review with recommendation of applications under Article 15 of the Zoning Order.

14. Defendantst Larry Barnett, Fred Burch, Lawrence Collins, R. N. Greene, Rector Jones, Robert Kirby, Donald McMillan, Barry

Neltner, Thurman Owens, Ralph Rush, Floyd Sharp, Carol Smith, and William Viox, are members of the Boone County Planning Commission (herein "Commission Members"), who in their capacity as commissioners have taken part in action described in rejecting the use of the Zoned Parcel, all of which have aggrieved and injured Vesper. William Viox is Chairman of the Commission (herein "Chairman") and has authority and acted in such capacity uniquely in relation to the Zoned Parcel.

15. Erpenbeck Commercial Enterprises, Inc. contracted with Vesper to purchase, among other property, the Zoned Parcel. Erpenbeck was the applicant before the Fiscal Court and Commission for utilization of the underlying zone on the Zoned Parcel.

FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF

III. Statement of Case and Controversy

16. In December of 1986, the Fiscal Court adopted the Zoning Order based upon alleged authority-granted by the Zoning Enabling Legislation.

17. Pursuant to the Zoning Order, the Fiscal Court adopted a Zoning Map for Boone County which indicated that the Zoned Parcel was zoned a combination of "C-2" Commercial District Two and "I-1" Employment District Industrial One. The section of the Zoned Parcel designated "C-2" was overlaid with a "PD" Planned Development special zoning district as defined by Article 15 of the Zoning Order.

18. The "C-2" District is the type of zoning which permits a variety of retail business and office uses without limit to the market area which is serviced including but not limited to: department stores, discount stores and major purchase retail centers. The purpose of "C-2" district is:

> " . . . to provide comparable shopping goods, personal and professional services, and some convenience goods required for normal living needs as well as major purchase opportunities." (Zoning Order, Section 920)

Uses in a "C-2" district include all uses permitted in a "C-1" or "O-1" district. The minimum size of a development in a "C-2" district is two acres with maximum intensity for development over four (4) acres of 18,000 square feet of gross floor space per acre.

19. The "I-1" Employment District Industrial One is a type of zoning which permits small to medium scale transportation, warehouse, light manufacturing and related services. Uses permitted in the district include but are not limited to: wholesale manufacturing, distribution and assemblage of products, and truck terminals. The minimum size of the development is five acres with the maximum intensity not exceeding 25,000 square feet of gross floor space per acre.

20. Pursuant to the Zoning Order, the placement of a "C-2" district (Section 920) and "I-1" district (Section 1030) are located on suitable lands with access to expressways or arterial roads in a regional trade and transportation environment.

21. The "PD" Planned Development is a special overlay zoning district, provided for in the Zoning Order, Article 15, which allows some variety among land uses and densities. Article 15 of the Zoning Order describes the intent of the "PD" district as:

> " . . . to provide a permissive and alternative zoning procedure . . . (for) . . . proposals capable of providing substantial values to the community over the conventional districting and other regulations prescribed as normal course in this order . . ." (Section 1500) (emphasis added)

A "PD" is an overlay zone which means there is always an underlying zone which serves as a reference point to determine principally permitted uses under the standard zoning classification. A "PD" zoning will allow variance of use, design, intensity, size and other features of a development. A "PD" district will allow intensity of uses equal to 150% of use permitted in the underlying district.

(A) Zoning with a "PD" Overlay District.

(i) Pursuant to the Zoning Order, a planned development district overlay may be approved by the Commission and Fiscal Court in the manner provided by Article 15 tsection 1502).

(ii) The procedure for obtaining a "PD" overlay is initiated by the owner of the property to be overlaid with the "PD" designation:

(1) the owner meets with the commission staff, where, among other things, the staff would specify the modifications required of the Concept Development Plan and the applicability of other regulations (Section 1503);
(2) the owner submits a Concept Development Plan (Section 1504);
(3) the Commission conducts a public hearing (Section 1505);
(4) the Commission makes a recommendation on the Concept Development Plan (Section 1506); and
(5) the Fiscal Court acts on the Commission's recommendation (Section 1507) by placing the "PD" overlay, on the owner's property.

This procedure is the only procedure described in Article 15 for the application of a PD to an underlying zone in Boone County.

(B) The Commission's Review of the Concept Development Plan.

In reviewing the Concept Development Plan (step 3 above), the standard that the Commission is required to apply is specified in Zoning Order Section 1506 as:

> " . . . it is consistent with the intent and purpose of this order; whether the proposed development . . . justify the deviation from the standard district regulations." (emphasis added)

22. The Zoned Parcel has never been the subject of an approved Concept Development Plan. Accordingly, pursuant to the Zoning Order, the Zoned Parcel was not subject to the regulations of Article 15.

23. By placing the PD overlay on the Zoned Parcel, without owners' request, the Fiscal Court allowed no permitted uses on the parcel without further legislative action.

24. A parcel with a PD overlay placed upon it at the initiative of the Fiscal Court, cannot obtain a zone permit under Article 14 of the Zoning Ordinance without legislative action by the Fiscal Court.

25. Vesper, by contract, agreed to sell the Zoned Parcel, along with the balance of the tract of land, to Erpenbeck.

26. Erpenbeck contracted to sell to Hyper Shoppes, Inc., dba Bigg's (herein "Bigg's"), the Zoned Parcel for the construction of a retail shopping mall to accommodate a Bigg's discount store (herein "Project").

27. Bigg's had the option to withdraw from the purchase should Erpenbeck be unsuccessful in timely obtaining the necessary permits from Boone County for the construction of the Project.

28. Erpenbeck similarly had the option to withdraw from the contract of purchase and sale with Vesper if Erpenbeck was unsuccessful in obtaining the necessary permits from Boone County for the construction of the Project.

29. Erpenbeck, through its officers and agents, met with the staff of the Commission and explained the details of the Project.

30. The purpose of this meeting and other meetings with the staff of the Commission was for the staff to advise Erpenbeck of any manner in which the Project proposal violated requirements of zoning laws so that modifications, if necessary, could be made or considered before the public hearing.

31. Erpenbeck explained that the Project was or could be modified to be wholly consistent with the underlying zoning on the Zoned Parcel and that to resort to the rezoning or increased densities of the PD overlay (as provided in Article 15 of the Zoning Order) was unnecessary.

32. The staff of the Commission, including the Boone County Zoning Administrator, Jerry Newton, instructed Erpenbeck that no proposal for the Zoned Parcel would be accepted without the filing of a Concept Development Plan as defined by Article 15 of the Zoning Order and KRS Section 100.111(8).

33. At no time prior to the final decision was Erpenbeck advised of any manner in which the Project violated requirements of the underlying "C-2t' or "I-1" zoning or any other zoning regulation.

34. Erpenbeck protested the submission of a Concept Development Plan since the Project was consistent with the underlying zoning on the Zoned Parcel.

35. Based on the Zoning Administrator's interpretation of the Zoning Order, Erpenbeck was incorrectly and needlessly required to submit a Concept Development Plan to the Commission and to undergo the procedures of Article 15 of the Zoning Order.

36. In an effort to mitigate damages, on November 1, 1989, Erpenbeck filed an application affecting the Zoned Property for 'The Utilization of an Underlying Zone in Planned Development' @ with the Commission which clearly disclosed that the uses and intensities of the Project were consistent with the underlying zone and that none of the benefits of a PD Planned Development were requested or required.

37. The Commission scheduled a public hearing for November 29, 1989 on the application at which time the hearing was rescheduled to December 6, 1989 because of the large number of witnesses in attendance.

38. On December 6, 1989, a Public Hearing was conducted by the Commission at the Boone County High School gymnasium where the staff delivered its report and testimony was taken from various witnesses.

39. Although not reflected in the minutes of the Commission meetings, the application of the Erpenbecks was apparently assigned by the Chairman to a committee for review and recommendation. This committee consisted of Barry Neltner, Fred Burch, Rector Jones, Larry Barnett, Carol Smith and Phil Damstrom (who did not appear to participate).

40. The Committee of the Commission filed its report, dated January 30, 1990, and made no findings regarding the Project and its relationship to the underlying zoning nor did the Committee determine whether the Project was a deviation from the standard district regulation.

41. The Committee, in its report, concluded the Project was evaluated from a "land use standpoint" and volunteered the Erpenbeck proposed end-user of the Zoned Parcel (i.e. Bigg's) could find other locations in Boone County.

42. On January 3, 1990, the Commission without comment adopted the report of the Committee and recommended to the Fiscal Court "that the proposed use not be allowed."

43. The Boone Fiscal Court, at its meeting on February 6, 1990, without comment, adopted the final action of the Commission and refused the use of the Zoned Parcel as described in the Project.

44. Based upon the actions of the Fiscal Court, Bigg's has cancelled the contract with Erpenbeck and Erpenbeck has cancelled the contract with Vesper.

IV. Argument

45. Defendants, Fiscal Court and Commission, and the individual Commission Members named herein, in denying the use of the underlying zone on the Zoned Parcel grossly abused their discretion, acted contrary to law, and acted in a manner that bears no reasonable relationship to the public health, safety, morals, or general welfare.

46. The Defendants have adopted procedures inconsistent with the Zoning Order and/or applied the Zoning Order in such a manner as to deny Vesper the reasonable and proper use of the Zoned Parcel. These procedures included but were not limited to:

(a) misapplication of the PD Planned Development Overlay Zone designation; and/or

(b) failure to make findings as required by Section 1506 of the Zoning Order.

47. Vesper had exhausted all available and reasonable administrative remedies and/or appeals, and any other remedies, if any, would be unduly burdensome on Vesper or futile or unreasonable.

48. The restrictions, limitations and procedures imposed by the Defendants upon the use of the Zoned Parcel through the Zoning Order and its interpretation:

(a) bear no reasonable relationship to the public health, safety, morals, or general welfare, and are in excess of the legislative and regulatory power of the Fiscal Court and the Commission; and

(b) are improper, invalid, and contrary to law as applied; and

(c) are unreasonable, arbitrary, and confiscatory, and, therefore, unconstitutional.

49. The actions of the Fiscal Court in adopting Article 15 of the Zoning Order as interpreted by the Commission and the Fiscal Court in its use of PD Overlay Zoning is contrary to and not authorized by the Zoning Enabling Leglslation and is thereby an abuse of the powers of the Fiscal Court, unreasonable and arbitrary.

50. The action of the Fiscal Court and the Commission and its Commission Members in denying the request of the Erpenbecks for use of the Zoned Parcel:

(a) is not supported by substantial evidence, but is clearly erroneous based on reliable, probative, and material evidence in the records;

(b) was based on matters which were irrelevant, immaterial, nonsupportive, and as such, were insufficient for denial, and thereby constituted arbitrary and capricious action on the part of the offending Defendants; and

(c) constitutes a tortious interference with the vested property rights and contractual relations of the Plaintiffs.

51. The rights of Vesper are affected and continue to be affected by the Zoning Order as interpreted and applied by the Fiscal Court, Fiscal Court Members, Commission, and Commission Members in such a manner as to seriously injure and affect the property rights of Vesper, to wit:

(a) Offending Defendants are exercising unconditional and unfettered discretion as to what type of development may occur on the Zoned Parcel; and/or

(b) Offending Defendants are applying and interpreting the various conditions, requirements, and recommendations of the Zoning Order in such a manner to arbitrarily and capriciously deny requests for development of the Zoned Parcel.

52. The Project submitted to the Commission and Fiscal Court by Erpenbeck was, in fact, wholly consistent with the Zoning Order.

V. Relief Sought

Appellant-Plaintiffs demand:

A.) The Court declare the denial of the use of the Zoned Parcel as proposed in the Project by Erpenbeck and the restrictions

and limitations imposed by the Fiscal Court and Commission upon the Zoned Parcel are unreasonable, arbitrary, confiscatory, and not reasonably related to the public health, safety, morals, and general welfare, and therefore, are unconstitutional and invalid;

B.) The Court declare that the placing of the "PD" Planned Development district overlay zoning on the Zoned Parcel was inconsistent with the Zoning Order, and that Article 15 of the Zoning Order has no application to the Zoned Parcel or in the alternative that Article 1S on its face or as applied to the Vesper property is unconstitutional and void;

C.) The Court declare that the findings of the Commission and Fiscal Court in denying the use of the Zoned Parcel as requested by the Project filed by Erpenbeck were not in accord with the mandates of the Zoning Order for review of such Project and thus were null and void;

D.) The Court declare that the Fiscal Court and Commission's action in denying the reasonable use of the Zoned Parcel and/or in not authorizing the reasonable use thereof, constituted a gross abuse of discretion and is contrary to the law; and

E.) The Court declare that the Project proposed by Erpenbeck is a reasonable and proper use of the Zoned Parcel, and therefore, is permitted;

F.) The Court declare that the actions of the Defendants constitute the causes of action hereinafter set out in the Second through the Sixth Causes of Action;

G.) The Court award Plaintiffs the costs of this Court and this litigation and reasonable attorney fees; and

H.) The Court award Plaintiffs all further relief, legal and equitable, to which Plaintiffs may be entitled.

SECOND CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT
(INVERSE CONDEMNATION)

53. The Plaintiffs repeat and reallege the allegations of the previous paragraphs and incorporate same as if written herein.

54. The acts or actions of the Defendants, and each of them, previously referred to herein were the acts taken by agents and employees of the Fiscal Court.

55. All such acts by agents and employees were taken by such agents and employees acting in their official capacities or acting under color of law and in accordance with official policy, custom and practice of the Fiscal Court.

56. This cause being against the Fiscal Court, the funds and property held in the name of Boone County, Kentucky or the Fiscal Court will be subject to execution as a result of any award to Plaintiffs in this action.

57. Under this cause of action, Plaintiffs do not seek an award that would result in subjecting to execution the funds or property held in the names of individual Defendants other than Boone County, Kentucky or its Fiscal Court.

58. The action of the Defendant, Fiscal Court, in denying the use of Plaintiffs' Zoned Parcel was without authority and in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Sections 1(5), 2, 3, 13, 14, 59 and 242 of the Constitution of the Commonwealth of Kentucky.

59. As a result of the unauthorized taking of an interest in Plaintiffs' property, a right has accrued to Plaintiff for recovery from the Defendant, Fiscal Court, of just compensation of the interest taken from the time in which that taking was effected, summer, 1990.

THIRD CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT
(STATUTORY VIOLATION)

60. Plaintiffs repeat and reallege the allegations of all paragraphs and incorporate same as if written herein.

61. The action of the Defendant, Fiscal Court, in adopting, interpreting and/or enforcing the Zoning Order is inconsistent with the provisions of the Zoning Enabling Legislation and has caused Plaintiffs to suffer damages for which recovery is provided under KRS 446.070.

FOURTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT

(INTERFERENCE WITH CONTRACTUAL RELATIONS)

62. Plaintiffs repeat and reallege the allegations of all paragraphs and incorporate same as if written herein.

63. Vesper had agreed to sell the Zoned Parcel and the adjoining tract of land to Erpenbeck and Erpenbeck had agreed to purchase the Zoned Parcel and the adjoining tract of land. Erpenbeck had a further agreement to sell a portion of this property to Bigg's. These contracts were known to the Defendants.

64. As a direct result of the Defendants' refusal to timely allow the use of the Zoned Parcel, Bigg's was forced to cancel its agreement with Erpenbeck and Erpenbeck was forced to cancel the agreement to purchase the Zoned Parcel and the adjoining tract of land.

65. The Defendants have intentionally and improperly engaged in conduct in their official capacity to cause Erpenbeck not to complete this contract. The conduct and acts of the Fiscal Court and its agents were without justification, contrary to legal requirements, and in excess of and an abuse of their authority.

66. As a result, Vesper has lost the benefit of its bargain and Vesper has been damaged in an amount as not yet determined. Erpenbeck has lost the benefits of its bargains with Vesper and Bigg's and has been damaged in an amount not yet determined.

FIFTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT

(42 U.S.C. SECTION 1983 AND SECTION 1988)

67. Plaintiffs repeat and reallege the allegations of all paragraphs and incorporate same as if written herein.

68. The Defendants' actions referred to herein are in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States in that they constitute a taking of Plaintiffs' property without just compensation and a deprivation of Plaintiffs' property without substantive or procedural due process of law.

69. The Defendants' taking and deprivation of Plaintiffs' property caused Plaintiffs substantial loss and damage. Included in such loss and damage are the diminution in the value of the property by the taking, even if deemed temporary with regard to Vesper, and the total destruction of the property with regard to Erpenbeck.

70. Plaintiffs are entitled to recover their loss and damages from the Fiscal Court pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and pursuant to 42 U.S.C. Section 1983, and their reasonable attorney's fees pursuant to 42 U.S.C. Section 1988.

SIXTH CAUSE OF ACTION IN THE
ALTERNATIVE SEEKING
AN AWARD OF MONETARY DAMAGES FROM THE
FISCAL COURT MEMBERS AND COMMISSION MEMBERS
(ACTION IN THE ALTERNATIVE TO SECOND, THIRD,
FOURTH AND FIFTH CAUSES OF ACTION)

71. Plaintiffs repeat and reallege the allegations of all paragraphs and incorporate same as if written herein.

72. This cause of action is in the alternative to the Second, Third, Fourth and Fifth Causes of Action and only advanced if the Fiscal Court denies the allegations of paragraphs 55 and 56 above, or offers an affirmative defense discharging the Fiscal Court from liability for the acts of the Fiscal Court Members or Commission Members which would not be available to such members.

73. The actions of the Fiscal Court Members and/or Commission Members were taken by such Defendants acting in their official capacities and acting under color of law, but said actions were not taken pursuant to official policy, custom or practice of Boone County, Kentucky or its Fiscal Court.

74. The acts or actions of the Fiscal Court Members or Commission Members were taken negligently or willfully in the real or feigned belief that same were in accordance with the official policy, custom or practice of Boone County, Kentucky or its Fiscal Court or the Commission.

75. The illegality of the Fiscal Court Members or Commission Members' actions is clearly established and such illegality was known or should have been known to them at the time the actions were taken.

76. The Fiscal Court Members or Commission Members are jointly and severally liable to Plaintiffs on the preceding causes of action.

77. Plaintiffs seek a judgment which would subject the funds and property held in the names of Fiscal Court Members or Commission Members to execution.

WHEREFORE, the Plaintiffs demand:

A) Judgment for the Plaintiffs against Boone County Fiscal Court for the loss, damage and expense in an amount as not yet determined but in excess of the minimal jurisdiction of this Court.

B) For interest at the lawful rate from the date of loss, damage or expenses until judgment is paid.

C) In the alternative, judgment against the individual Defendants who are Fiscal Court Members and Commission Members under the Sixth Cause of Action in an amount as not yet determined.

D) Recovery of costs and attorney fees and for all other relief to which they are entitled.

E) For trial by jury on the issues presented in this cause of action.

ALEX F. TALBOTT
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Counsel for Erpenbeck Commercial Enterprises, Inc.

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served upon Dale Wilson, Attorney for Boone County Planning Commission and its Members, 7699 Tanners Lane, Florence, Kentucky 41042; Larry Crigler, Attorney for Boone County Fiscal Court and its Members, 2995 Washington, Burlington, Kentucky 41005; and Paul J. Vesper, Attorney for Vespers, 1005 Madison Avenue, Covington, Kentucky 41011, on this the ~ day of May, 1991, by ordinary United States Mail, first-class, postage prepaid.

ALEX F. TALBOTT

ARTICLE 15

PLANNED DEVELOPMENT (PD)

Section 1500
Intent
The intent of this article is to provide a permissive and alternative zoning procedure for innovative, mixed use residential, commercial, industrial or other type developments or physical design proposals capable of proving substantial value to the community over the conventional districting and other regulations prescribed as normal course in this order but requiring unique consideration, disposition, control and approval. Planned Development (PD) is special overlay zoning district, which allows some variety among land uses and densities in return for imaginative designs.

Since Planned Development is an overlay zone, there is always an underlying zone which serves as a reference point to determine principally permitted accessory and conditional uses under the standard zoning classifications. However, if certain uses, which are not normally permitted in the underlying zone, are compatible, the Planned Development zone may be flexible to allow these uses. Also, the physical boundaries of the underlying zones within a Planned Development are intended to be flexible and not restrictive.

The intensity of use in a Planned Development zone may exceed by no more than fifty (50) percent the maximum intensity permitted in the underlying zoning district. If building - intensity increased in Planned Development, then the amount of open space (e.g., existing vegetation, buffer areas and new landscape) should increase proportionately.

A planned development may vary the height, use, organization, design, intensity, size or other features of the proposed development. In the case that a specific corridor study has been adopted for an area, intensity and open space recommendations of that study shall apply to specific development sites within the study area. (*See Status of Amendments)

The planned development zone is intended to encourage:

- A maximum choice of living environments by allowing a variety of housing and building types and permitting a reduction in lot dimensions, yards, building setbacks, and area requirements;

- A more useful pattern of open space and recreation areas and, if permitted as part of the project, more convenience in the location of accessory commercial uses and services;

- A development pattern which preserves and utilizes natural topography and geologic features, scenic vistas, trees and other vegetation, and prevents the disruption of natural drainage patterns;

- A more efficient use of land than is generally achieved through conventional development resulting in substantial savings through shorter utilities and streets;

- A development pattern in harmony with land use density, transportation facilities, community facilities, and objectives of the comprehensive plan.

- A signage package in harmony with the objectives of the Planned Development.

Section 1501
Provisions Governing Planned Unit Developments
Because of the special characteristics of planned developments, special provisions governing the development of land for this purpose are required. Whenever there is a conflict or difference between the provisions of this article and those of other articles of this order, the provisions of this article shall prevail. Subjects not covered by this article shall be governed by the respective provisions found elsewhere in this order.

Section 1502
Application and Procedure
Upon approval by the Planning Commission and the legislative body or Fiscal Court, a planned development district may be applied to any other existing district in this order. Upon approval of a concept development plan, the Official Zoning Map shall be annotated for the land area involved so that the district name includes the notation, "PD." Planned development districts shall be approved by the Planning Commission and the legislative body or Fiscal Court in the manner provided in this Article.

For development plans on sites within the Houston-Donaldson Study Area, the recommended Implementation procedure in that study shall be followed. This may result in a development not following the normal Planned Development process if those development plans are consistent with the recommendations of the 'Houston-Donaldson Study'. This shall be determined through a Technical Committee recommendation to the full Planning Commission at the next regular Business Meeting. Decision as to the review process to be followed shall be by simple majority vote. (*See Status of Amendments)

Section 1503
Pre-Application Meeting
The developer shall meet with an appropriate staff person of the Planning Commission prior to the submission of a concept development plan. The purpose of the meeting will be to discuss early and informally the purpose and effect of this order and the criteria and standards which may apply, and to familiarize the developer with the detailed objectives of the comprehensive plan and its elements, this order and this article.

For development plans within the Houston-Donaldson Study Area, a pre-application meeting of the applicant with the Technical Committee of the Planning Commission shall also be held. The purpose of this meeting is to arrive at a recommendation to the full Planning Commission as to whether or not the developer's plans are consistent with the recommendations of the "Houston-Donaldson Study". The Technical Committee meeting may be held immediately prior to a

Business Meeting, and recommendation of the committee may be verbal. (*See Status of Amendment)

Section 1504

Submittal and Contents of Application for Approval of Concept Development Plan

The Planning Commission shall require that a Concept Development Plan be submitted for property located in a Planned Development zone. The Concept Development Plan may be filed to the Planning Commission by the owner(s), owner by contract (option) or lessee of property for which the planned development is proposed. The concept Development Plan shall include the following minimum requirements. The list of other requirements are optional only. With certain type of developments, it may be beneficial to submit a Concept Development Plan that is more detailed or provides more information to the Planning Commission. The list of other requirements are highly recommended for these types of developments and to provide further support for approval of a Concept Development Plan by the Planning Commission. In the case that a specific corridor study is in effect for a site, the optional requirements of a Concept Development Plan are especially important. Any special areas of concern in such a study must also be addressed by the Concept Development Plan. For sites within the Houston-Donaldson Study Area, Design Review and Signage information is required as part of the developer's plan information. (*See Status of Amendments)

Minimum Requirements

1. General Site Characteristics - ownership, geography, soils, drainage, vegetation and other physical characteristics.

2. Transportation Patterns - public and private roads and internal and external circulation patterns.

3. Land Use Characteristics - existing and proposed land uses, structures and buildings (general description of size, area and height).

4. Utilities and Infrastructure

5. Relationship of Proposed Zone Change or Submitted Concept Development Plan with Comprehensive Plan - how specifically the proposed zone change or Submitted Concept Development Plan would conflict, conform complement or otherwise affect the Comprehensive Plan. (see Section 308)

OPTIONAL REQUIREMENTS OF CONCEPT DEVELOPMENT PLAN

1. Include items 1-5 in the previously mentioned list minimum requirements.

2. An area map showing adjacent property owners and existing land uses within 200 feet of the parcel.

3. If the site has unusual or unique natural features, demonstrate how proposed development preserves and utilizes natural topography and geologic features, scenic vistas, trees and other vegetation, and prevents the disruption of natural drainage patterns. If necessary, geotechnical studies should be submitted to indicate soil types, depth of bedrock and slope stability.

4. The location, description and size (acreage) of land uses.

5. Approximate location and number of residential units (if any) along with approximate square footage, density and height.

6. Approximate location and size (square footage) of non-residential buildings.

7. The location of public and private roads, rights-of-way, easements and parking.

8. Calculation of amount of open space both before and after construction. Indicate areas of expected open space and new landscaping. Include maintenance plans for these areas.

9. Where portions of the site are subject to flooding, the Concept Development Plan shall indicate extent and frequency.

10. General location of water, sanitary sewer, telephone, electrical and storm water lines. Capacity levels are recommended.

11. General description of the availability of community facilities such as schools, fire protection services and other types of facilities if any, and how these facilities are affected by this proposal.

12. Preliminary assessment of excavation and fill requirements along with storm water retention and detention plans.

13. Indicate the staging or construction schedule of the project.

14. Submit a detailed traffic study if the proposed development is large-scaled or it the project would significantly alter existing traffic patterns or volume.

15. Submit a sketch or drawing of the proposed buildings to demonstrate the visual appearance or a type of architecture.

The Planning Commission and legislative body or Fiscal Court may recommend or approve the proposed district subject to any conditions or qualifications found merited in the Concept Development Plan or other conditions on the site. The Commission's approval in principle of the Concept Development Plan shall constitute a commitment to the planned land use types and intensities. Approval in principle shall not be construed to endorse a precise location or mixture of uses, configuration of parcels, arrangement of physical design, engineering feasibility or other particulars. The Planning Commission may seek assistance in making its recommendation from any appropriate source.

Section 1505
Public Hearing by Planning Commission
Upon receipt of an application for approval of a concept development plan, the Planning Commission shall hold at least one public hearing, within thirty (30) days of receipt of the application, after notice as required for amendment under Kentucky Revised Statutes, Chapter 424. The following notice, in addition to any other notice required by statute or local regulation or order, shall be given:

1. Notice of the hearing shall be posted conspicuously on the property for which the planned development is proposed at least fourteen (14) days.

2. Notice of the hearing shall be given at least fourteen (14) days in advance of the hearing by registered mail or by certified mail, return receipt requested, to owners of all property adjoining the property for which the planned development is proposed. It shall be the duty of the person or persons proposing the amendment to furnish the names and addresses of the owners of all adjoining property. Records maintained by the Property Valuation Administrator may be relied upon conclusively to determine the identity and address of property owners. (*See Status of Amendments)

3. Notice of the hearing shall be published in a newspaper of general circulation at lest once, but may be published two (2) or more times, provided that one (1) publication occurs not less than seven (7) days prior to the hearing. Said published notice shall state, at a minimum, the time, place and purpose of the hearing.

Section 1506
Approval in Principle by Planning Commission
Within thirty (30) days after the public hearing required by Section 1505, the Planning Commission shall review the concept development plan to determine if it is consistent with the intent and purpose of this order; whether the proposed development advances the general welfare of the community and neighborhood, and whether the benefits, combination of various land uses, innovation of physical design, and

the inter-relationship with the land uses in the surrounding area justify the deviation from standard district regulations. The commission's approval in principle of the concept Development Plan shall be necessary before a Preliminary Development Plan may be approved. Approval in principle shall constitute a commitment to the planned land use types and intensities. Approval in principle shall not be construed to endorse a precise location or mixture of uses, configuration of parcels, arrangement of physical design, engineering feasibility of other particulars. The Planning Commission may seek assistance in making its recommendation from any appropriate source.

Section 1507

Action by Legislative Body or Fiscal Court

After approval of the Concept Development Plan by the Legislative Body or Fiscal Court, or determination by the Planning Commission that the developer's plans are consistent with a specific study that impacts the development site, the developer shall submit a preliminary development plan to the Planning Commission. The preliminary development plan may cover the entire site shown in the concept development plan or a section of said site. The preliminary development plan shall be general conformance with the concept development plan approved in principle. Five (5) copies of the preliminary development plan shall be submitted and must be endorsed by a Professional Engineer, Architect, or Landscape Architect registered in the Commonwealth of Kentucky. (*See Status of Amendments)

Section 1509

Contents of Application for Approval of Preliminary Development Plan

An application for approval of the preliminary development plan shall be filed with the chairperson of the Planning Commission by at least one (1) owner, owner by contract, (option), or lessee of property for which the planned development is proposed. Each application shall be signed by the owner or lessee, attesting to the truth and exactness of all information supplied on the application for preliminary development plan. Each application shall clearly state that the approval shall expire and may be revoked if construction on the project has

not begun within three (3) years from the date of issuance of the approval. The application shall contain the following information:

1. A survey of the proposed development site, showing the dimensions and bearings of the property lines, structures and improvements, area in acres, topography, and other existing features of the development site bearing on the plan including major wooded areas, structures, streets, easements, utility lines, land uses, and the like;

2. All the information required on the Concept Development Plan: the location and sizes of lots, location and proposed density of dwelling units, non-residential building intensity, and land use considered suitable for adjacent properties;

3. A schedule for the development of units to be constructed in progression and a description of the design principles for buildings and streetscapes; tabulation of the number of housing units proposed by type; estimated residential population by type of housing; estimated non-residential population; and standards for height, open space, building density, parting areas, population density and public improvement proposed for each section of the development whenever the applicant proposes an exception from standard zoning districts or other orders governing development;

4. Engineering studies and plans showing, as necessary, water, sewer, drainage, electricity, telephone, and natural gas installation; waste disposal facilities; street improvements, and nature and extent of earthwork required for site preparation and development;

5. A site plan, showing multi-family or nonresidential building(s) or single family residential lots, various functional use areas, circulation, and their relationship;

6. Conceptual or typical landscaping, facade, paving, street furniture and other plans and designs;

7. A description of deed restrictions, protective convenants, and

other legal statements or devices to be used to control the use, development and maintenance of the land, and the improvements thereon, including those areas which are to be commonly owned and maintained.

The approval of the preliminary development plan shall constitute and substitute for the approval of a preliminary subdivision plat as required by the Boone County Subdivision Regulations. The engineering and other information required for the preliminary development plan shall generally be submitted at the same level of accuracy and detail as is required in the Preliminary Subdivision Plat.

Improvement plans and final plats shall be submitted in accordance with the standards and procedures required in the Boone County Subdivision Regulations, or, where no subdivision of land is required in accordance with Article 14, Site Plan Review, of this order.

Section 1510
Decision by Planning Commission

Within sixty (60) days after receipt of the preliminary development plan, the Planning Commission shall approve as presented, approve with supplementary conditions, or disapprove the preliminary development plan, stating the reasons for its action in writing.

Section 1511
Expiration and Extension of Approval Period

The approval of a Preliminary Development Plan for a planned development district shall be for a period not to exceed tow (2) years to allow for preparation and recording of the required subdivision plat the development of the project. If no construction has begun within three (3) years after approval is granted, the approved preliminary development plan may be voided and the land may revert to the district regulations in which it is located when the process for Amendment in Article 3 is followed.

No zoning amendment passed during the time period granted for the

approved preliminary development plan shall in any way affect the terms under which approval of the planned unit development was granted. A one (1) year extension of an approved Preliminary Development Plan may be granted upon request to the Planning Commission.

Section 1514
Permitted Uses
Any uses found to be compatible and of value to the community under the proposal may be combined in planned development districts provided that the proposed location of the uses will not adversely affect adjacent property, and/or the public health, safety, and general welfare and/or the specific objectives of the comprehensive plan.

It is also provided that the amount of land devoted to each use in a planned development shall be specifically determined by the Planning Commission.

Section 1515
Intensity
The intensity of use in a planned development may exceed by no more than fifty (50) percent the maximum intensity permitted in the underlying zone district.

Section 1516
Minimum Size
The minimum size or area required for a planned development overlay shall be no less than five (5) acres.

Section 1517
Minimum Standards
A planned development and its permitted, accessory and conditional uses, buildings or structures shall be subject to the supplemental, parking and loading, signage regulations of this order, unless superseded by any special requirements, conditions, variances or other particulars imposed by the Planning Commission during the concept or preliminary application and hearing phases described in this article. Such special conditions may include provisions governing project

ownership, common open space lands or facilities, disposition of open land, infrastructure provisions including any physical design and/or any other requirement found to be necessary appropriate or desirable for the purposes of this district.

Such conditions shall be made a part of the terms under which the development is approved. Any violation of such conditions shall be deemed a violation of this order.

Section 1518

Amendments to Concept Development Plan and Preliminary Development Plan

Amendments to the Concept Development Plan involving changes in the development concept, uses, intensity or other elements must be submitted to the Planning Commission and shall conform to the procedure described in Sections 1505-1507. Changes to the Preliminary Development Plan must be submitted to the Director for his approval. The Director shall make a determination that the proposed change does not affect the overall development concept in terms of use, intensity and design, before approving a change. A denial of a proposed change to the preliminary development plan by the Director may refer any proposed change to the preliminary development plan to the Planning Commission for their decision.

Stop the Insanity!

By Lane H. Kendig

The zoning game has long since lost any sense of sportsmanship; it bears a greater resemblance to trench warfare than a game. *See* R. Babcock, *The Zoning Game* (1966). Developers and public planners are both part of the industrial system that builds communities. Planners and local government develop a plan, and developers are the producers of housing, commercial, and industrial buildings. In any system, there will of necessity be some friction. Unfortunately, the current relationship is blatantly adversarial in most communities. Even in communities that are unabashedly pro-growth there is an underlying attempt to extort everything possible from developers, with communities continually upping the demands. In communities with strong no-growth sentiments, the strategy is to delay and attempt to extort totally unrelated concessions in hopes that the developer will go away.

Neither side is without fault. There are bad developers, and there are developments that have created major problems. Tile development community often refuses to work with planners, choosing instead divisive battles on regulations. However, the current insanity is, to a significant extent, the fault of government.

On the municipal side, there is a distrust and often antipathy towards developers without regard to the quality of the proposals. There is an unwillingness to recognize that developers' businesses can be adversely impacted by regulations, just as developers often refuse to acknowledge that improper development increases the cost of governmental services. What is particularly troublesome is the prevalent attitude of government and citizens that there is no need to consider the economic impact that regulations have on developers or large landowners. The result is a general disdain for private property rights. There is often the attitude that the value of existing

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homeowners' property rights is to be vigorously protected at the expense of the rights of owners of vacant land.[1] Compounding these problems is the fact that the level and detail of land-use regulations has dramatically increased in recent years. More regulation, more agencies, and conflicting policies all make the process of seeking an approval more cumbersome, costly, and less certain.

The problem has worsened and the antipathy towards developers has become far more pronounced and widespread. Throughout the period of deteriorating relationships, when a landowner went to court to seek redress, the playing field was tilted to favor local government in most states. Even in Illinois, a state that has long had a balancing test, developers face major constraints—time and money. *See La Salle National Bank of Chicago v. County of Cook,* 145 N.E. 2nd 65 (1957), 9 ZD 273.

For developers, litigation is generally a losing proposition, tying up money in a property for years rather than allowing the company to continue making its product. The time and cost can bankrupt a developer. In four decisions—*First English, Nollan, Lucas,* and *Dolan*[2]—the Supreme Court has given the playing field a new tilt. This article is a wake-up call to planners. Unless planners reform their approach to regulation, it is reasonable to expect further action by the courts to remove "the judicial thumb from the government's side of the scale." *See* M. Berger, *Planning Staffs 'Outed' by Lucas Opinion,* 44 Land Use Law & Zoning Digest, No. 9 at 7 (1992).

Worse yet, if planners continue to ignore property rights in their planning, it is likely that legislation will pass in some states that mandates compensation in land-use cases, a factor that has a high probability of inhibiting sound planning.

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[1]. This is a distillation of a decade of comments, made by planners, citizens, and elected and appointed officials, that the author has heard while representing both local governments and developers.

[2]. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378 (1987), 39 ZD 206, Nollan v. California Coastal Comm'n, 107 S.Ct. 3141 (1987) 39 ZD 226; Lucas v. South Carolina Coastal Council,112 S.Ct.2886 (1992),44 ZD 302; and Dolan v. City of Tigard,114 S.Ct.2309 (1994), 46 ZD 232.

The tilt towards landowners has had a long gestation. The Supreme Court ruled on zoning in 1926 and then largely stayed out of the picture until 1974. *See Village of Belle Terre v. Boraas,* 416 US 1 (1974), 26 ZD 56. It then began a series of cases probing the taking issue with *Agins* in 1980.[3] Zoning was normally considered a legislative act; the challenger had to overcome a presumption of validity in favor of local government. In general, developers faced an uphill battle to challenge local regulations in most states.[4]

In *Ramapo, Petaluma,* and *Penn Central,*[5] the playing field tilted more in favor of government, giving broader scope to planners and local governments. The first cases in which there was a challenge to find a regulatory taking were met with technicalities that seemed to raise new barriers to even getting a decision with the issue of "ripeness."[6] Now we have *First English, Nollan, Lucas,* and *Dolan*—all of which have had the effect of leveling the playing field. The presumption of validity and an unwillingness of the courts to second guess the legislature still remains, but there is now a burden assigned to government to demonstrate a balancing.

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[3]. Agins v. City of Tiburon, 447 U.S. 255 (1980), 32 ZD 256. Some might use Village of Belle Terre v. Boraas,416 U.S.1 (1974), 26 ZD 56, or Penn Cent. Transp . Co. v. New York City,438 U.S.104 (1978),30 ZD 434, as the starting point.

[4]. The most important exception is Pennsylvania, where the curative amendment process, while time-consuming and costly, provides a direct remedy for the frustrated landowner. In Illinois, there is a balancing test that occasionally gives pause to local regulators.

[5]. Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F. 2d 897 (1975), 27 ZD 527, and Golden v. Town of Ramapo, 285 N.E.2nd 291 (N.Y.1972), appeal dismissed, 409 U.S. 1003 (1972), 24 ZD 99, both provided a new line of regulatory potential for managing and controlling growth. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104,124 (1978) gave a blessing to transferable development rights. This was an exciting time for planners. The courts were providing more tools for addressing urban ills, and it seemed that there was little to fear from severely restricting property rights.

[6]. Agins (1980); San Diego Gas and Electric Co. v. Citv of San Diego, 450 U.S. 621 (1981), 33 ZD 122; and Williamson County Regional Planning Comm'11 v. Hamilton Bank of Iohnson City, 473 U.S. 172 (1985), 37 ZD 286, all required the landowner to exhaust all remedies before the case would be ripe for decision.

Illinois has long had a balancing test applied in zoning cases—the *La Salle* factors.[7] The "essential nexus" seems to call for a strong connection between the public purpose and the means chosen to achieve that purpose. *See Nollan.* Now, *Dolan v. City of Tigard* has provided a "rough proportionality" test. The need for a balancing of interests became clear in *First English;* once a legislative taking and temporary taking were upheld, it did not take a rocket scientist to see that it was only a matter of time before the court took corrective action to level the playing field.

In planning circles, there is general hand-wringing over these four cases. Planners and elected officials seem to fear that the courts are out to strip away the ability to plan. *Use Law & Zoning Digest,* read by many planners, provides commentary on those cases with pro-developer and promunicipality spins on the decisions. (Five discussions of three issues on *Lucas* appeared in 1992 and 1993.) There is discussion about ways to craft regulations that work their way around the decisions. This is unfortunate. What is needed is for planners to recognize that they bear a large responsibility for the current insanity. Planning needs to fundamentally rethink its regulatory approach to account for, not ignore, property rights.

After more than 25 years of planning practice, some important elements become clear. The taking issue provided great encouragement to public agency planners to regulate protection of the environment. *See* F. Ebosselman, D. Callies, and J. Banta, *The Taking Issue (1973).* In the 1960s and 1970s, there were many major issues waiting to be addressed by planners—growth management, agricultural preservation, environmental protection, and housing. *The Taking Issue* emboldened planners to dare address these problems. Encouraged by how difficult it was to prove a taking, planners dared to write zoning ordinances that addressed these important planning issues. The first steps were taken with great concern and considerable care. These efforts succeeded and were upheld by the courts. As a result, confidence increased and many longstanding problems were finally addressed.

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[7]. La Salle National Bank (1957). La Salle established a series of criteria, including the degree to which the landowner (economically) or municipality (concerning public health, safety, and welfare) was harmed. It also looked at trends of development and the length of time the property had been vacant under the regulations.

As is often the case, the taste of success resulted in an effort to regulate more and more. Unfortunately, less care was taken because planners felt it was difficult to overturn a regulation used to protect the health, safety, and welfare of communities. Abuses resulted. There are cases in which strong regulations with significant impacts are essential to the implementation of an important goal. However, more modest planning objectives need more modest implementation strategies.

As with too many people today, planners can take themselves too seriously. Planners see planning as an absolute "good"[8] that can do no wrong. By inference, any person or group that challenges planning and zoning must be bad. The logic is obviously flawed; like everything else in the world, both planning and development can be either good or bad. An important corollary is that mandatory planning does not alter this premise. There is a great deal of checklist mentality in mandatory planning states. Checklists, such as the ones found in the old Department of Housing and Urban Development 701 Plans, cannot assure good plans.

The profession could continue wringing its hands, in which case adjustments will be made by the legislatures or courts. But now is the time to ask: What are the forces operating within public planning that have led to challenges to local government regulations? What are the solutions?

HOW PLANNING GOT INTO TROUBLE

Aside from the facts in the litigation, there are a number of clear trends in planning that point toward a need for corrections in the way local government regulates land.

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[8]. Planners are "good guys" unless they recommend something citizens do not want, then they are accused of all varieties of sins. Developers and landowners are often considered "bad guys," the rapers of land who greedily destroy the environment to line their pockets.

Discretionary Zoning

First on the list of what is wrong is the widespread use of discretionary zoning techniques.[9] Discretionary zoning is zoning by negotiation. There are likely to be three different forces involved in a discretionary zoning issue: landowners and developers, public placers and officials, and citizens. Discretionary zoning is the primary source of game playing. Read a book on negotiation. The cardinal rule is always to enter a negotiation with a position from which one may retreat to the position one is willing to accept. This encourages developers to present plans that have problems and are clearly not the best plans. Local government makes unreasonable demands for dedications, improvements, or other "conditions" that are not supported by the community's regulatory standards. Citizens may be interested only in defeating the proposal.

Once people begin playing games in which they have power, they lose sight of the original goals. Government officials are empowered by the conditional use process. This gives officials a chance to make demands that give them power over the landowners and developers. Power often becomes addictive; planners are very vulnerable to this. So long as there is legislative authority for special or conditional uses, the practice spreads. The practice of making unsupported demands is now common in the approval of plats.

For example, a community in Illinois claims to preserve a rural residential character with its five-acre zoning. Its subdivision regulations call for 36-foot-wide concrete streets, plus curbs, sewer, water, and street lights. No existing residential street in the village comes close to meeting these standards. In the midst of litigation,"[10]

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[9]. Included in this discussion are various land-use control elements outside traditional zoning: the Army Corps of Engineers 404 wetland permits; environmental impact systems such as those in use in California and Oregon; special purpose commissions; architectural review; wetland-coastal commissions common in New England; the California and South Carolina coastal agencies; and the Florida Development Regional Impact (DRI) process. These examples are largely discretionary approvals.

[10]. Korhumel v. County of Lake, Lake County Circuit Court, 1994. The village, through residents, was an intervener.

when it was found during discovery that the regulations would be used against them, the village passed an ordinance indicating that the regulations would not be enforced on the landowners' property. The village used the regulations to require the developer to seek a variance from patently absurd regulations, thus giving the village the right to impose additional conditions. A village manager informed the author that no plan that was higher than three-quarters of the permitted density would be approved.[11] As this illustrates, every success by a community encourages officials to seek more. Developers in Flagstaff, Arizona, said the conditional use process was "like trying to kick a field goal while the other team ran around the end zone with the goal posts." (Source: Author's interviews with various parties in the process of writing a new zoning code.)

The use of discretionary zoning approvals has exploded. Many zoning ordinances contain few, if any, permitted uses. Not surprisingly, this leads to litigation. *Nollan* and *Dolan* both involve discretionary permits. Is the reliance on discretionary permits needed? Planned unit developments (PUDs) can be used as an example. The rationale for PUD ordinances to be discretionary has long passed. If in 1968[12] the planners and courts could all agree that rigid Zoning was too inflexible and PUDs were a solution, is it unreasonable to ask: Why has the profession not replaced rigid Euclidian zoning? The profession is suspect for not having replaced rigid standards with flexible standards. Planning has actually increased its reliance on discretionary approvals over the 26 years since *Cheney*.[13]

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[11]. Village manager of Mundelein, Illinois. The developer agreed because he wanted to build or sell, not litigate.

[12]. Cheney v. Village 2 at New Hope, Inc., appeal, 429 Pa. 626, 241 A. 2nd 81 (1968),20 Z[) 178. When thiscasewasdecided, the Pennsylvania courts accepted the fact that although no such vehicle was authorized, it was in line with the best plamaing practice, and it struck a balance between better planning and rigid unresponsive regulations.

[13]. In Pennsylvania and Illinois, PUDs were recognized as a valid tool before the legislature got around to providing enabling legislation.

A common purpose statement in PUD ordinances is that the PUD will provide more opportunity to design a flexible development that better responds to unique conditions than standard zoning districts. It is possible to write flexible standards that do not rely on conditional approvals. The continued reliance on conventional (cookie cutter)[14] zoning and discretionary approvals makes one suspect that the purpose is to force developers to negotiate.

There is absolutely no question the conditional process s has led to the assumption that the local government has total discretion in the regulatory environment. Courts in many states have encouraged that assumption by exempting legislative acts from strict scrutiny. The presumption of validity places the burden almost entirely on the landowner to prove that government has erred. While this is an important separation-of-powers issue, it has allowed and even *encouraged* municipalities to ignore the rights of the landowner.

The *Dolan* decision has made the whole concept of conditional zoning perilous. Its discretionary nature invites local government to stretch and reach as did the City of Tigard, resulting in a taking. Discretionary zoning should be applied only to uses that are so controversial that special hearings are a political necessity. Landfills are a good example of such a controversial use. Early on, when a problem is first identified, a conditional review may be necessary. There is even a planning rational for moving away from discretionary approvals—to gain more consistency. Negotiation cannot produce consistency. Negotiation implies that the results of an application are largely unpredictable. Within a couple of years, a solution should be found and zoning revised.

NIMBY Syndrome

Citizens are a major factor in land use. "Not In My Back Yard" (NIMBY) unfortunately describes the concerns of citizens participating in land-use decisions. The NIMBY influence in land-use decision making continues to grow. At one time, this attitude described citizens' reactions to LULUs ("Locally Undesirable Land Uses"),[15]

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[14]. L. KENDIG, ET AL., PERFORMANCE ZONING (Bucks County Planning Commission,1973).

[15]. F. J. Popper, Siting *LULUS, 47 PLANNING 12* (April 1981).

and it was applied to landfills, group homes, and other uses that anybody would consider controversial. Citizens were willing to acknowledge that there was a regional need for such uses, but they wanted them elsewhere in the community. A sign of the times is that the NIMBY, on reaching maturity, has become a CAVE ("Citizens Against Virtually Everything") person.

The planning profession welcomes citizen participation as a sign of true participatory democracy. However, landowners and developers are citizens, too. A balancing of rights is essential. Citizens should be involved in the plan and ordinance formulation stage, not in areas where the rights of specific landowners are debated in an arena of intense territoriality by neighbors. This also applies to avoiding discretionary approvals. A major way to avoid creating problems is to avoid situations where NIMBYs become involved in adversarial hearings. Pitting one citizen against another is not good democratic planning. There are communities in which nearly every nonresidential use of land requires a discretionary approval. This is unwarranted and a recipe for trouble.

The combination of NIMBYs and requiring discretionary hearings for most uses permits citizens to organize opposition to every development. Landowners subjected to adversarial hearings are vulnerable to continual overreaching by government. The problem is that neighbors are unlikely to want adjoining land developed. Citizens have a negative opinion of developers and large landowners; thus, every application—good or bad—is opposed. They decide that all developments are too dense, lead to congestion, destroy the environment, and/or create a host of other problems.

Ironically, the projects are likely to be similar to the one in which the opponents live. This drawbridge mentality has been around for decades. (Once a family moves in, it is time to pull up the drawbridge and save the land !) However, with urban ills moving into the suburbs and a public increasingly well-educated in planning and zoning matters, it has reached crisis proportions. Now, upon submitting a development plan, a developer immediately faces a request to reduce density. This occurs despite a long recognized finding that one of the biggest ills—urban sprawl—is in part defined by low density. The results adversely impact landowners either by denying a legitimate use of the land or imposing often unwarranted conditions to placate opponents.

Taxes

The tax revolt has exposed the landowner/developer to one more form of blackmail.[16] If local government cannot raise taxes, then a new source of revenue is needed. Who better than the developer? There are well-crafted impact fees that address real problems, yet many more are extortion. In one community, the staff wants residential development to pay for more than 60 percent of village services even though an analysis of revenues indicates that 60 percent of tax revenues come from nonresidential uses. *See* author's tax impact studies in Gurnee, Illinois.

As with all good concepts, impact fees get pushed to the absurd. *Use Land Law & Zoning Digest* published an article about an impact fee for the preservation of rural land.[17] The proposal is a classic governmental attempt to stretch the envelope of regulation. The impact fee requires owners of the little remaining rural land to pay for preserving some of the dwindling supply. The fact is that the homes of existing community residents destroyed most of the rural land they now seek to preserve. This agricultural impact fee transfers the cost of preservation from the people who benefited (by acquiring a house) from the past consumption of farmland and who will benefit by the preservation of the little remaining open space (by having views over open landscape) to the small group of landowners who have preserved land until now. That this occurred in California, home of the tax revolt, is not surprising. This is clearly an example of transferring the cost of broad public benefits to a minority who gains no benefit from the achievement of the goal.

There are still communities in the nation that will install sewer, water, and a variety of public services to developments that will bring jobs. Large employers, such as auto plants (BMW, Saturn), Sears, and others are able to hold off competition, encouraging state and local governments to provide economic development funds

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[16]. The developer is in business to build things. It takes years to litigate an exaction that is not founded in specific regulatory language. The first reaction of most planning commissions is to ask for something that Will reduce the intensity of use. While planners bemoan urban sprawl, they promote it in nearly every land-use decision.

[17]. A. Mudge, *Protecting Fnn111arld tltrougil Inipact Fees in California, 44* LAND USE L. & ZONIIS . DI(.., No. 1 at 3 January 1992).

(i.e., subsidize development) to keep or gain jobs. Is it fair or equitable for small developments, such as gas stations, hardware stores, or fast food chains to be subjected to a variety of impact fees, arm twisting, or outright extortion when big development is given free improvements? No; clearly it is inequitable.

Time v. Justice

If all the above is true, why are the courts not clogged with zoning litigation? The answer is simple—very few developers can afford to litigate. Developers will settle if it is at all practical. Please note that almost all the recent Supreme Court cases are brought by outraged, rather small landowners. A church, Nollan, Dolan, even Lucas are not developers in the traditional sense. For every lawsuit filed, dozens of individuals cannot afford to bring suit.

Developers cannot by and large tie up their money in years of litigation. The still unresolved *Mayhew v. Sunnyvale,* 774 S.W.2d 284 (Tex. App.1989),42 ZD 252, has been around since 1987. The developers have long since bailed out of the case and left the landowner. Most planners count on the fact that the developers only have an option on the ground, and will cut their losses and seek another property. Another strategy is to outlast the developer, as local government has deep pockets compared to the vast majority of landowners.

The length of time it takes to get a local government decision reversed is a major deterrent to the landowner. Pennsylvania's curative amendment process is one of the more streamlined processes. In theory, a landowner challenges the ordinance. The local government holds a hearing and makes a decision to alter its regulations or stand by them. The developer may appeal the decision to the courts, and the appeal is on the record made at the curative amendment hearings. But, even this process can be dragged out. Local governments consist of part-time officials who often meet only once a month. It can take six months or more just to hold the hearings. The costs can easily mount to the point where many developers cannot afford to challenge. It is, however, less costly than an entire trial at which—despite public hearings—discovery and legal maneuvers can chew up hundreds of thousands of dollars and years of time. Few landowners can sustain the cost of litigation; this permits government to ignore the rights of all but the most determined.

The whole notion of ripeness is another pitfall. The municipal staff gets paid no matter how many applications are made. How much should a developer have to throw away in fees, professional experts, interest, or option costs? Failure to ask for a variance, whose procedures are clearly delineated, is a legitimate ripeness issue. However, the community whose plan and ordinances will not permit the use should not be able to require a developer to make fruitless and costly applications. In all discretionary situations, a local government can approve a plan w ith conditions. Justice requires fairness and responsibility on the part of local government.

If a developer asks for 500 dwellings in a planned development or conditional use application, a community could approve the plan on the condition that it be reduced to 320 dwellings. The developer can accept this or go to court. This would result in a set of known conditions to be evaluated by the courts. It is unfair and inequitable to ask a developer to revise the plan downward without explicit guidance, in hopes he can find the point at which the local government will find the plan suitable. Equal protection should require zoning to be clearly written so that a professional can submit a plan that meets the code. Ripeness in discretionary proceedings is akin to Russian roulette.

Planning Is Good In some respects, planners get a missionary complex. Planning is "good," thus anybody who disagrees with planning is by definition the "bad" heathen. In part, this is what underlies the battles between planners and developers or landowners. It is not uncommon to hear professional planners lump all developers in the "rapist of the land" category. This is a distortion of reality. "Good" and "bad" are terms that can be used equally to describe municipal land-use plans or developers' plans. It is also critical to distinguish between arguments over the general desire to protect the public and the specific means used. Too many planners accept the "ends justifies the means" approach.

It has been stressed that planning is a process. Many state regulations, including those of Florida, California, and Oregon, set forth fairly detailed planning criteria. But the fact that a community has gone through the process and gained state approval does not make a plan a good one. A quality plan is one that, if implemented, will

actually lead to the achievement of the desired goals. Unfortunately, implementation carries costs. There are two basic means of implementing a goal: spend government (public) money, or regulate (pass the cost on to others). The tests imposed by the Supreme Court should not be viewed as anti-planning. They have asked planners to use implementation strategies that achieve the goal (essential nexus) and balance the public good against the damage to the landowner (rough proportionality).

The fact that private goals conflict with some planning goals does not mean the private goals are bad. Many comprehensive plans have conflicting goals. For example, most growth management plans place stress on housing costs, which adversely affects the affordable housing goal. That does not mean growth management is bad. Similarly, landowners' protests that they are being asked to bear too great a burden should be taken as a public concern. If government feels no obligation to seek a balancing of conflicting public and private interests, then it clearly forfeits its legislative role of finding a balance. Since this is the mantle that confers the "presumption of validity," government must take seriously its responsibility to seek a balance. In doing so, planners must develop a strong ability to be critical of their own work.

Many planners are not looking seriously at the critical issue of balancing public interests and landowner rights, but rather are worried about losing the ability to operate unfettered by consideration of the landowners' rights.

Planners can begin their refocusing by understanding that there are numerous bad plans and by not instinctively supporting all plans. Planners often rationalize bad planning because they think of planning as a process. The rationalization goes something like this: "Planning is good; planning should listen to people; therefore, the result of a planning process is good." This rationalization is dangerous, because it attempts to justify ignoring landowners' rights. A good plan would demonstrate a sensitivity to a landowner's rights in selecting the implementation process and how closely it fits with public purposes.

REINVENTING PLANNING REGULATIONS

It seems evident that the courts are moving to restore a balance be-

tween the achievement of laudable public goals through various regulatory systems and private property rights. The opinions presented in *Lucas* and *Dolan* make clear that the majority of the Court is trying to swing the pendulum back to a more even balance.[18] Planners fear the pendulum will swing too far, destroying the ability to plan. (For example, in footnote 7 at 2894 of *Lucas*, Justice Scalia strongly indicates a willingness to entertain a partial taking.)

How does one restore the balance without destroying the ability of local government to implement its planning functions? The answer lies firmly in the planner's grasp. The profession must clearly reassess how it goes about writing regulations. The following guidelines set forth the elements that must be built into regulations to ensure private rights are not trampled:

• A *balancing* of public and private interests should become a fundamental step done by planners in drafting regulations.

• Because there are normally a number of regulatory options, the one selected by local government should be that which best achieves the governmental objective with the *minimum disruption* to property values.

• Numerous market forces impact a landowner. Regulations need to provide flexibility for the landowner to adapt.

• Certainty for all landowners, neighbors, and the public is critical. Uncertainty or a lack of clear standards creates the potential for abuse. Each group has different needs w ith respect to certainty that should be studied when developing regulations.

• Wherever possible, standards should be *quantifiable*. General statements of principles that require interpretation to determine if the standard is met are undesirable.

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[18]. Justice Blackmun, in Lucas, indicated his fear that the Court's new policy will spread beyond the narrow confines of the present case. Dissenting opinion, at 2904. In Dolan, Justice Stevens considered the decision to "break considerable and unpropitious new ground." Dissenting opinion at 2322.

• Care needs to be taken to *streamline approvals* by eliminating time-consuming and overlapping approvals.

• Governments should be cautious in pushing the envelope of public regulations to expand their scope or shift costs to landowners.

Reinventing planning using these guidelines is easier than one would think. The Supreme Court has already laid out two major tests: rational nexus (see *Nollan)* and rough proportionality *(see Dolan).* The first two guidelines suggest how a local government might plan to avoid running afoul of these tests. The remaining guidelines suggest ways in which the planner may seek to address concerns of the landowner, public, and staff. Admittedly, they seem more oriented towards the landowner. The reason is simple; in cases in which the courts have had to weigh the concerns of the landowner, there is no lack of understanding of the general public purpose. The underlying, or at least the declared, purposes of the regulations have all been valid public objectives.[19] In every case, options existed that might have better or equally achieved the goals.[20] Thus, the issue is not whether planning and zoning would be hamstrung; the issue is educating planners to select the options that respect private rights while achieving the same objectives.

Balancing

The rationale for deferring to the legislative branch is that legislative decisions are supposed to balance competing interests. While there are numerous examples of carefully considered regulations that sought

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[19]. In Nollan, it is arguable that the California Coastal Commission's real objective was not the declared visual access to the ocean but, rather, the right of public access to the beach.

[20]. In Nollan, clearly bulk and setback requirements could have addressed the view issue. In Lucas, a variance procedure would have avoided the problem. Lastly, in Dolan, every city objective could have been achieved by the use of standards for building and detention. While nobody questions the value of bicycle and pedestrian ways, it is clear to most rational observers that hardware/building supply sales is not a use that is likely to attract many bicycle riders or pedestrians.

to balance public goals with private rights, it is clear that in many communities this is a foreign concept.

Balancing is easy. The first step is to evaluate the public gain versus the private imposition. Illinois has long employed this test.[21] For planners, the gain to the public can be measured by health, safety, and general welfare. Turning to environmental protection, the highest level is protecting the public from being exposed to conditions that can threaten people or buildings. A more generic purpose, such as aesthetics, which may advance the public welfare, should not result in the same level of impact on land values as does a regulation that protects the public from health or safety risks. Planners should be able to prioritize the level of impact and gain.

For example, regulations designed to prohibit development that might lead to damage such as occurred along the Mississippi and Missouri rivers in 1993 or in Georgia in 1994 are intrinsically more important than regulations whose sole purpose is aesthetics. In flooding, there is loss of life, economic loss to families and whole communities, and loss to the taxpayers of the whole nation.[22] A landowner clearly has little right to profit if the profit carries a high risk to the users of the property. On the other hand, aesthetic regulations should not impose a large proportional burden on a use, if the aesthetic treatment of the use will accrue value to the community as a whole.

Minimum Damages to Property Rights

Normally local government may chose its implementation strategy from a number of regulatory options. Given a series of options, the local government is obligated either to select one that best achieves the governmental objective with the minimum disruption to property values or to give the landowner a clear choice. In *Dolan*, a number of techniques were available to the City of Tigard to control flooding and stormwater. The city had to prohibit building in the floodplain to

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[21]. *Same* La Salle (1957). One of the factors to consider in determining an ordinance's validity is "the relativegain to the public as compared to the hardship imposed upon the individual property owner."

[22]. In 1991, total damages paid by National Flood Insurance Programs were $2,524,502,816. FEMA expenses were $166,398,675. Source: FEMA.

obtain flood insurance. The city could have required each landowner to provide stormwater detention which, in combination, would have accomplished the goal. If a citywide solution were desired, a special taxing district could have been created to spread the cost among all who benefited. The city chose to go for the most damaging—land dedication to the city.

Selecting the alternative is not a difficult task. In most cases in which the environment is concerned, a single concept—clustering—will do the job. For example, floodplains, wetlands, forests, and steep slopes can usually be preserved while still permitting densities close to that which would normally be permitted on sites without such resources. If clustering is provided and development achieves the zoned density, no taking occurs.[23] The important factor is always seek the best possible balance for the environment *and* the landowner.

The impact on individual parcels should be considered as well. Planners can easily assess the impact by overlaying parcel maps with protection areas. If very small parcels fall entirely within the protected area, a special strategy will need to be adopted that recognizes the unique impact on these property owners.

Flexibility

Conventional zoning is very rigid. The market to which developers must respond is dynamic. Gaining approval for a project now takes months or, in some jurisdictions, years. The numerous market forces that impact a landowner are beyond the control of both the developer and local government. One thing that government could do, which would greatly benefit landowners, is to make regulations more flexible as a matter of right. The ability to respond to changing market conditions without lengthy hearings and high costs would increase the value of land without any change in the permitted densities. It would also contribute to achieving an important planning goal—encouraging a broader mix of housing.

Note that flexibility must be a matter of right. Planned unit developments are often considered a form of flexible zoning. Unfor-

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[23]. A note of caution is needed: Environments exist in which the topography or resources sharply restricts very large areas. More extreme forms of clustering maybe needed and gross densities may also need to be reduced.

tunately, they bind the developer to a site-specific plan. Changing the plan in response to changing market conditions is fraught with difficulties, particularly if the market were to favor less-expensive units. The flexibility must be a matter of right, so that all that is required to shift direction would be meeting the subdivision standards.

Certainty

Certainty is the holy grail of zoning. Certainty is desired by the landowner, neighbors, and government. Neighborhood residents want certainty that the character of their community will not be destroyed as the area grows. The landowner would like the certainty of a reasonable use of the land when that land is marketed. Lastly, government has planning objectives it would like to be certain of achieving. The problem is in providing zoning that achieves this all-around certainty.

Conventional zoning, in effect, requires the local government to chose who wins and who loses. Conventional Euclidian zoning with land use and lot size rigidly segregated by district fails to meet the needs of the development community or landowner. The reality of the market is that prospective developers seek the best site on the market, not the best site. In a rigid system, there is a high probability of a mismatch between the purchaser's needs and the zoning.[24] Thus, the need to change the zoning fails to provide certainty for the developer. A change of zoning implies a change in character and a failure to provide certainty for the neighbors as well.

Conventional land-use and lot size regulations rarely relate to environmental or other specific purposes that zoning is increasingly expected to protect. Because it does not relate to these objectives, it cannot provide certainty for important public objectives. The structure of conventional zoning also provides a mismatch between the objective and the means of achieving it.

Negotiated or discretionary zoning processes are, by definition, uncertain. These regulations encourage game playing by all three parties—developer, citizen, and government. Negotiation must result in uncertainty for all three parties. The rules of sound negotia-

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[24]. In Lake County, Illinois, a parcel was rezoned back and forth three times as the landowner sought a purchaser in the midst of a shifting market.

tion encourage abuse. Government officials who learn to play the game well seek to exact ever-increasing commitments from the landowner without any rules. It is no surprise that *Nollan* and *Dolan* both came from the application of discretionary zoning. In playing the development game, it is too easy to lose sight of basic objectives and become consumed by the game. The objective becomes winning more and more concessions—creating more and more uncertainty for landowners and developers.

Quantifiable Standards

Wherever possible, standards should be quantifiable and measurable. (general or vague statements of principles such as "protect the environment to the maximum degree possible"[25] are wide open to interpretation. This violates the objective of certainty. Because there is no quantification, individual judgment is encouraged. It is possible to develop a series of principles or tests that no development can actually meet, but this invites abuse. *See* Zoning Regulations, Teton County, Wyoming. Zoning is easily adapted to quantifiable measures. Once a measurable standard is set, there is no question as to its meaning. A maximum density of three dwelling units per acre does not mean 3.25.

Selecting measurable standards to achieve specific goals has a beneficial side effect. The analysis leading Up to selecting a standard requires the local government to demonstrate that the standard selected has a rational nexus with a public purpose or goal. It also quantifies the impact on the landowner. Quantification thus assists the government in examining the regulation to see if it meets both the nexus and proportionality tests.

Timely and Definitive Approvals

Well-written regulations can benefit the development community with no adverse impact on any legitimate objective of the public. Time is money to developers. A process that has measurable standards and flexibility as a matter of right will result in rapid and certain approvals. This increases profits. Care needs to be taken to eliminate time-

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[25]. This is a paraphrase of language often found in planned development or conditional zoning regulations.

consuming and overlapping approval processes. Unfortunately, the planning profession and elected officials have tended to increase the number of bodies that must rule on a development approval.

Certainty is meaningless if you get a certain zoning density that is modified by an environmental or appearance commission. The development community is stressed in King County, Washington, by a new regulatory approach, Quality Urban Environment (QUE) and the survival of the State Environmental Protection Act (SEPA). Given the county's objective to concentrate development to achieve a variety of goals, the county finds that it, too, can be frustrated by overlapping regulations. *See* D. R. Porter, *No Easy Answers in King County, Washington*, 53 Urban Land 29 (July 1994).

The frosting on the cake is the cost and uncertainty of the discretionary process. It reaches the heights of absurdity in some environmental areas, most notably wetlands. The U.S. Army Corps of Engineers routinely is months behind in approving projects. A large number of the reviews are completely discretionary, up to the biases of a low-level employee who has nearly absolute discretion. This discretion is often wielded with a heavy hand by individuals who believe developers are bad people who make too much money.[26]

Again, time is money to developers. Faced with mounting bills for planners and lawyers, many developers or landowners are forced to cave in to regulations or conditions that violate their rights simply so they can get on with business. The costs of carrying the acquisition of the land, as well as the cost of lost opportunities to make money on the investment, become unbearable, and concessions are made to end the frustration of the discretionary process.

Pushing the Envelope

It is essential that local government occasionally push the regulatory envelope to achieve a better level of planning. A certain amount of exploration is good for planning and the law. A great many important community goals would not have been met if planners did not push their clients' interests. The vast majority of municipal plans

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[26]. This observation comes from conversations with Corps of Engineer employees and many planners. It is not uncommon to find a lack of concern for private property rights among these professionals.

have no intent to break new ground. Unfortunately, municipal governments are routinely pushing the envelope, either by seeking to expand the scope of regulations or by shifting traditional public costs to a small group of landowners. In a complex society and environment, there is a need to explore ways of solving new problems that do not always include pushing the envelope. When radical or costly regulations are forced on ordinary everyday uses, there is a reason for concern.

While there will always be zoning battles and litigation, the current situation is generally out of control. The battles have been going on so long that in nearly every case planners and developers line up on opposite sides regardless of merit of the case or proposal. Mindless choosing of sides is a sign of a polarized noncommunicative system. This represents an unhealthy condition.

PERFORMANCE-ORIENTED PLANNING AND ZONING

As it turns out, there is no need to completely reinvent planning and zoning. All seven of the previously enumerated goals may be achieved by using performance zoning. Since the early 1970s, performance zoning has been working and tested in numerous jurisdictions. The planning profession[27] has had ample exposure to it. Performance zoning requires the local government to identify planning goals and then write regulations that specifically achieve these goals. This forces the community to go through its own process of assuring that there is a rational nexus between its regulations (public purposes) and what is required of the developers (mitigations of development impacts).

From its inception in Bucks County, Pennsylvania, performance zoning has been designed to seek a balance. It provides more choice in land development options, greater flexibility in design, certainty, and speedy processing for the developer. While respecting property rights, it has been successful in achieving difficult objectives such as protection of natural resources, enhancement of water quality, preservation of community character, and effective allocation of scarce governmental resources to support new development.

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27. L. KENDIG, PERFORMANCE ZONING (Bucks County Planning Commission,1973), and L. KENDIG, PERFORMANCE ZONING (PjannerS Press,1980).

Since performance zoning has always included the notion of balancing, it meets the public purpose and rough proportionality criteria.

In developing the performance zoning system, there was a conscious effort to ensure that the selected option would meet the governmental goal while giving the landowner sufficient flexibility. For example, consider buffering neighboring land uses from a new use. Instead of specifying a single buffer, the model ordinance provided a range of options from which the landowner could choose. Since 1980, it has been possible to develop pure performance standards that permit nearly infinite flexibility. The Public is given certainty of protection from uses of a given intensity, and the developer has both certainty and flexibility A wide range of land uses is permitted, and trade-offs (plant material for land) can be made so that the developer can select the option that best meets the parcel's situation. Thus, performance standards meet the "least restrictive" criteria and the "flexibility" criteria. An ordinance designed with this in mind will more than likely meet the "rough proportionality" test.

Performance zoning seeks to make the vast majority of land uses permitted uses in the district, minimizing the use of discretionary approvals. The broader the list of permitted uses, the greater the certainty the landowner has of being able to market the property. Certainty for neighbors is provided by a variety of performance standards, each designed to address a land-use problem. Buffer yards protect neighbors in different zoning categories and screen parking and other uses that have intrinsic adverse impacts on residential properties. Performance standards control light and glare and other emissions from a site. Environmental standards that set levels of protection for natural resources guard against destruction of a community's resource base, while other performance standards address runoff, pollution, and mitigation.

Being certain that a municipality's community character will be protected is among the most critical issues for neighbors. Citizens appearing at zoning hearings are uniformly concerned with erosion of community character by the proposed use. Performance zoning is based on a system of community character analysis that quantifies the critical elements that make up an area's community character. These are translated into performance standards so that no matter what the land use, it must be built to achieve the character of district.

A gas station or fast food restaurant can be designed to have the character of a highway strip or the character of a suburban residential neighborhood.

Certainty is, by definition, impossible in discretionary approvals, because discretion means that ad hoc decisions will be made. The use of performance standards provides both flexibility and certainty. Providing certainty for government or neighbors requires the planner first to identify specifically what elements of a land use create a public health, safety, or welfare problem. Once the problem is identified, a performance standard is specified to provide the requisite protection. The process thus requires that a rational nexus be built into the regulation. Because a narrow focus is used, it is possible to use standards that achieve the objective without secondary adverse consequences.

Thus, performance standards quantify goal or policy statements by their very nature. Many discretionary conditional use or planned development regulations substitute policy statements for performance standards. An evaluation that calls for ensuring the protection of health, safety, and welfare is, in reality, a policy that calls for a board to render an ad hoc determination of whether the policy is met. A performance standard that relates land area needed for on-site waste disposal based on soil conditions is a performance standard whose relationship to the public health is clear. The quantification means that precise yes or no determinations can be made by a variety of people. The lot either has the minimum area or it does not; no discretion is involved. More than 20 years of experience with performance zoning indicates that performance standards can be developed for nearly all uses and areas of legitimate public concern.

In addition, performance zoning deals well with balancing landowner interests with legitimate needs to push the envelope of regulations. Performance zoning has always had to confront serious planning issues often pushing the envelope of regulations. In the early 1970s, it comprehensively addressed resource protection and growth management. The use of clustering and broader use options permitted pushing the regulatory envelope into new areas without placing the burden unfairly on the landowner. In Lake County, Illinois, it was shown that by permitting clustering as a matter of right, strict resource protection would not adversely affect the average density yield of development.

Caution is required whenever a planner begins pushing the envelope. The balancing philosophy of performance zoning is intended to eliminate the problem to the maximum degree possible. It certainly would have eliminated the underlying problems in *Nollan, Dolan,* and *Lucas.*

CONCLUSION

Fears abound that the Supreme Court decisions in *Nollan, Lucas,* and *Dolan* represent a threat to sound high-quality planning. There are those who fear these decisions threaten the ability of local government to deal with complex issues through the use of regulations. The threat is largely one of government's making. What is threatened is the view that government need be concerned only with the achievement of public policy objectives, and can and should ignore the rights of landowners.

If local government acts on the premise "that government is not concerned with the landowners' (developers') economics,"[28] then it risks trouble. It does not take much for that statement to become "government is not concerned with private property rights." Once the planners who write the plans and regulations understand that governmental objectives must be balanced against the impact on property rights, the threat of legal problems will decline greatly.

Compared with conventional zoning and discretionary approvals, performance zoning is a well-tested alternative that provides better protection and more certainty. Performance zoning has the added advantage of being based on the detailed study of problems; it uses standards that specifically address the problems in a manner that can easily meet the tests identified by the U.S. Supreme Court.

Planners can sit idly by and wait to see how far the pendulum will swing, or the profession can use performance zoning to rapidly reinvent the manner in which government regulates the use of land. A conservative reading of *Lucas* indicates that some members of the Court are willing to entertain a case that seeks partial damages

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[28]. This is a premise the author has heard voiced by planners and local officials both publicly and privately.

for regulations that are so severe that they approach a taking.[29] If local governments continue to fail to strike a balance between the achievement of goals through regulations and the impact of the regulations, such a case may not be too far around the corner.

On the other hand, that case can be avoided if government does a good job of balancing. In all three cases, government was overreaching. In *Nollan,* it was pure greed seeking something unrelated to the public purpose. In *Lucas,* poor drafting allowed the case to go to court in the first place. In *Dolan,* there was a failure to balance. All the goals except public access could have been achieved through the use of performance standards. Access unrelated to the use of the site dictates acquisition. If planners and elected officials recognize and develop regulations in which a balance is clearly presented, then there is nothing to fear.

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[29]. Justice Scalia said: "This analysis errd in its assumption that the landowner whose deprivation is one step short of complete is notentitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." Lucas, footnote 8 at 2895.